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ABSTRACT

This report assesses the civil rights record of Bill Clinton's presidential administration, examining progress made in federal civil rights law enforcement and policy development. Four sections include: (1) "Introduction: The Clinton Presidency in Perspective" (the civil rights landscape and continuing relevance of the fight for civil rights); (2) "Background: A Decade of Turmoil and Change" (key civil rights laws, judicial decisions, and agency enforcement in the 1990s; growing racial and ethnic tensions during Clinton's administration; socioeconomic disparities in the 1990s; and demographic change in the 1990s and beyond); (3) "An Evaluation of President Clinton's Civil Rights Record, 1993-2001" (significant civil rights issues of the Clinton administration, including diversity in the federal government, environmental justice, fair housing, equal educational opportunity, equal access to health care, the impact of welfare reform on women and minorities, and voting rights); and (4) "Lessons Learned." Overall, the Clinton administration transformed federal civil rights enforcement and policy efforts in many important ways but ultimately failed to develop or execute effective policies in several key areas relating to civil rights enforcement. Three appendixes present a civil rights timeline, 1990-00; executive orders relating to civil rights, 1994-00; and Clinton's recommendations for building one America. (SM)

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A Bridge to One America:

The Civil Rights Performance of the Clinton Administration

A Report of the United States Commission on Civil Rights

April 2001

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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
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U.S. Commission on Civil Rights
624 Ninth Street, NW
Washington, DC 20425

(202) 376-8128 voice
(202) 376-8116 TTY
www.usccr.gov

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A Bridge to One America:

The Civil Rights Performance of the Clinton Administration

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* Former Commission employee.

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Executive Summary

The transition from one presidential administration to a new one provides an opportune moment to reflect upon the civil rights successes and failures of the departing administration and to provide recommendations to its successor. In its long history, the U.S. Commission on Civil Rights has issued many reports focusing on the progress made in federal civil rights law enforcement and policy development. This report does so in the context of assessing the civil rights record of a particular presidential administration, that of President William Jefferson Clinton.

The period from January 1993 to January 2001—the term of the Clinton administration—was a unique time in history. Not only was the nation on the verge of a new millennium, its demography, economy, and technological capabilities were rapidly growing and changing. In addition, the political and cultural climate of this period was dominated more than ever before by the competing interests reflected in some very stark dichotomies—rich and poor, men and women, young and old, conservative and liberal—each a constituency holding its own, often opposing, views on how best to achieve positive change and assign policy priorities. Reconciling all these elements into a coherent and effective agenda would have presented a tremendous challenge for any presidential administration. How President Clinton sought to meet that challenge in the civil rights context, and the successes and failures that resulted, is the "story" this report tells.

Perhaps more so than any of his recent predecessors, President Clinton sought both to seize the opportunities and to confront the challenges created by an increasingly diverse America. Unfortunately, his eight years in office must be viewed as a promise only partly fulfilled in the civil rights context. It is true that President Clinton embraced and admired our country's rich diversity, recognizing that changes in the economic, social, and cultural structure of the nation called for more effective federal action to ensure equality of opportunity in all facets of life experience, for all Americans. In principle, if not always in practice, President Clinton emphasized the importance of vigorous federal civil rights enforcement. His administration, at least rhetorically, sought to advance the goals of equal opportunity and nondiscrimination by addressing an array of civil rights-related initiatives ranging from equal pay for women to hate crimes based on race, ethnicity, religion, and sexual orientation. Yet, President Clinton achieved only partial success in turning the rhetoric of strong civil rights enforcement into a practical reality.

With this study, the Commission finds that the Clinton administration transformed federal civil rights enforcement and policy efforts in a number of important ways, but ultimately failed to develop and/or execute effective policies in several key areas relating to civil rights enforcement, including immigration, drug enforcement, the death penalty, and disparate impact discrimination in the educational context.

When President Clinton entered office in 1993, he inherited an executive branch that for 12 years had taken a passive approach to civil rights law enforcement, limiting federal action to cases involving only blatant and obviously intentional forms of discrimination. Early on in the Clinton administration, the Justice Department reinforced for federal agencies the need to address all forms of noncompliance with federal civil rights law, including violations involving disparate impact discrimination. In general, the Clinton administration advocated and worked toward an aggressive federal civil rights enforcement effort. Moreover, the administration took on a number of important civil rights-related initiatives, including the ban on gay men and lesbians serving in the military, the legislative battles to provide expanded protections for employment nondiscrimination and hate crimes, and an ambitious and unprecedented report on the state of race relations in America. Although sometimes constrained by a lack of support among key actors and institutions, including the leadership in Congress and the military, President Clinton engaged in an eight-year long effort to rein-

vigorate civil rights law enforcement and redirect civil rights policies. It is clear from a review of the Clinton civil rights record that his administration embraced the goal of shaping civil rights efforts to reflect the opportunities and challenges of the nation's growing diversity.

The 1990s: Socioeconomic Disparities, Demographic Change, and Racial Tensions

The events of the 1990s made the civil rights efforts of the Clinton administration even more important. During the Clinton years, measures of unemployment, mortality, education, and other indicators of social and economic well-being continued to show disparities by race, ethnicity, and gender. One of the most significant changes in the United States during the 1990s, from a civil rights perspective, was the increasing diversification of the nation, which now signals a need for increased effort in enforcing civil rights laws. Before the end of the 21st century there will no longer be a white majority.

Several dramatic incidents of hate crime violence captured the nation's attention during President Clinton's years in office. In 1998 alone, 7,755 hate crimes were committed. The victims of such crimes—Matthew Sheppard, James Byrd, Ricky Byrdsong, Won Joon Yoon, and Joseph Ileto, just to name a few—have come to symbolize the violence and senselessness of these acts.

Many Americans were also deeply concerned about the presence of discrimination in sentencing decisions, particularly those involving the death penalty. Some argued that both socioeconomic status and race played a part in determining whether or not a death sentence was handed down. Other concerns relating to civil rights and law enforcement included racial profiling and misconduct by law enforcement officers. Highly publicized beatings and deaths of suspects and prisoners caused an outcry in many of the nation's urban communities.

Continuing pressures and concerns in these areas make it clear that the civil rights progress made during the Clinton administration must be continued by the next administration.

The Clinton Response: A Willingness to Address the Issues

President Clinton was an active participant in efforts to eliminate discrimination of all forms. Though not always successful, Mr. Clinton's civil rights-related efforts demonstrated his concern for the American public and his willingness to find innovative solutions in many instances. Through these efforts, the Clinton administration addressed controversial issues such as nondiscrimination on the basis of sexual orientation, disparate impact discrimination, and affirmative action. Though not always resulting in a positive solution, the President's willingness to address such issues brought national attention to many long-neglected problems.

Diversity in the Federal Appointments and Employment. More than any of his predecessors, President Clinton diversified the cabinet, the White House Staff, and top federal government positions. He relied often on executive orders and presidential memoranda to implement important policies, such as increasing the number of individuals with disabilities, Latinos, and Asian Americans in the federal work force. In fact, Mr. Clinton set in place several policies addressing discrimination in federal employment, covering such topics as religious freedom, sexual orientation, parental status, genetic information, individuals with disabilities, and Hispanics. Particularly noteworthy, President Clinton's executive orders extended protection from discrimination within the federal work force on the basis of the previously unprotected classifications of sexual orientation, parental status, and genetic information.

Diversity in Federally Conducted and Assisted Programs. During his presidency, President Clinton issued several orders aimed at increasing the participation of women and minorities in federally assisted and conducted programs. He issued executive orders directing government agencies to improve access to their programs and activities for persons with limited English proficiency and to increase the participation of Asian Americans and Pacific Is-

landers in federal programs. The Clinton administration's Justice Department also made progress in issuing and clarifying policies and procedures related to civil rights. In 1994, Attorney General Janet Reno issued a memorandum to agency heads concerning the use of the disparate impact standard in administrative regulations promulgated under Title VI and Title IX. In 2000, in response to the case, *Cureton v. NCAA*, a common rule was issued covering several agencies, which provided for the enforcement of Title IX in federally assisted programs.

Funding for Federal Civil Rights Enforcement. In addition, President Clinton requested increases in the federal budget for civil rights enforcement. Budgets requested for FY 2001 were higher than those for FY 1994. However, Congress did not always appropriate funds in accordance with the President's requests. In particular, the budgets of civil rights agencies did not fare well between FY 1996 and FY 1998. Concurrently, the workloads of all civil rights enforcement agencies continued to increase. Thus, while the President won some increases, his efforts did not necessarily reflect a strong priority on civil rights enforcement.

Executive Orders and Memoranda. The President also made prolific use of his executive order and presidential memoranda powers to address civil rights concerns. He issued orders on environmental justice, fair housing, employment of adults with disabilities, reasonable accommodation, nondiscrimination in federally conducted education and training programs, nondiscrimination in federal employment, and services for persons with limited English proficiency. The President also reissued the executive order on historically black colleges and universities and issued additional executive orders on educational excellence for Hispanic Americans, tribal colleges and universities, and American Indian and Alaska Native education, and established the President's Advisory Board on Race. Presidential memoranda providing instruction to federal agencies addressed such issues as the collection of data on racial profiling by law enforcement officers and the development of plans to improve hate crimes reporting. The Commission notes, however, that in some cases, the effectiveness of such actions was somewhat diminished by virtue of being issued in the President's second, rather than first, term in office.

Legislation and Court Cases. The Clinton administration supported legislation aimed at improving equal opportunity in many areas of life experience, including the Family and Medical Leave Act of 1993, the National Voter Registration Act of 1993, the Violent Crime Control and Law Enforcement Act of 1994, the Native Hawaiian Education Act of 1994, the Hawaiian Home Lands Recovery Act of 1995, and the Health Insurance Portability and Accountability Act of 1996. Legislation relating to civil rights supported by the Clinton administration that remained unenacted at the time he left office included the Health Security Act, the Patients' Bill of Rights, the Paycheck Fairness Act, the Employment Nondiscrimination Act, the Battered Immigrant Women Protection Act, and the Latino and Immigrant Fairness Act. The Clinton administration also became involved in several court cases that presented challenges to existing civil rights laws. While President Clinton and his administration did not aggressively court action on certain issues, such as Title VI violations, they did issue statements and *amicus* briefs on several issues including voting rights (in *Shaw v. Reno* and other cases) and domestic violence (*U.S. v. Morrison*).

Federal Protection for Indigenous Rights. One hundred years after the military overthrow of the Hawaiian monarchy and unlawful taking of lands, President Clinton signed into law the 1993 Apology Resolution, which expressed the commitment of Congress and the President to support reconciliation efforts between the United States and Native Hawaiians. President Clinton also became only the second-ever sitting president to visit an Indian reservation—he visited both the Navajo and Pine Ridge Indian reservations—and in 1994 he invited all tribal leaders to the White House.

Other Initiatives and Programs. President Clinton was actively involved in civil rights issues ranging from equal educational opportunity to environmental justice. For example, he requested that the Department of Education update its statement of principles on religious expression in public schools and took steps to strengthen bilingual and immigrant education. In 1997, the President unveiled the "Make 'Em Pay" Initiative, which was aimed at combating housing-related hate crimes. He also took an active role in debates over the use of sampling in the 2000 Census. Other Clinton administration programs included:

- *"Don't Ask, Don't Tell."* One of the President's first challenges in the White House was over the issue of discrimination on the basis of sexual orientation in the military. Although the resulting policy, "Don't Ask, Don't Tell," proved to be insufficient, the fact that the Clinton administration sought to address this longstanding problem reflects its willingness to tackle controversial issues with innovative ideas.
- *"Mend It, Don't End It."* During the 1990s, the concept of affirmative action was challenged on many fronts. The Clinton administration attempted to respond to these challenges in a variety of ways. The administration implemented affirmative action policies in the context of federal employment and contracting. Further, the Department of Justice took steps to address the Supreme Court's decision in *Adarand v. Peña*, by developing policy guidance and issuing regulations concerning affirmative action in federal contracting. Nonetheless, the Clinton administration failed to actively pursue affirmative action cases and violations of Title VI in court.
- *Community Policing and Crime Control Programs.* Before he was elected, President Clinton promised to place 100,000 additional police officers in America's communities. This was made possible with the passage of the Violent Crime Control and Law Enforcement Act in 1994, which authorized $8.8 billion for grants to law enforcement agencies for police officers and community-policing programs. The act also expanded coverage of the Hate Crime Statistics Act to include crimes based on disability and included the Violence Against Women Act and the Hate Crime Sentencing Enforcement Act. The legislation also addressed police misconduct, including discrimination in violation of constitutional rights and federal civil rights laws, and provided legal remedies for victims of such discrimination.

Unfortunately, in some cases, actions and inaction during the Clinton administration served to restrict the freedoms of certain Americans, or, in some instances, had a disparate effect on minorities. For example, little was done by the federal government to address sentencing disparities, particularly with regard to the death penalty. Further, the signing of the Antiterrorism and Effective Death Penalty Act of 1996 severely limited the right to appeal of persons on death row, which is overrepresented by persons of color.

Overall, President Clinton worked to facilitate national dialogue and effect change in innovative ways, relying on broad policy initiatives and verbal support of civil rights issues. Perhaps his most innovative endeavor was to create the unprecedented President's Initiative on Race, which resulted in the establishment of the White House's Office of the President's Initiative for One America.

Lessons Learned, a Path to Follow

President Clinton often spoke of "creating a bridge" to the 21st century. The Commission's review of the Clinton civil rights record reveals that, in some ways, President Clinton did translate his metaphorical bridge into a reality. However, while President Clinton's willingness to address controversial issues dramatically changed the national dialogue, all too often his good intentions failed to come to fruition, either due to political circumstances beyond his control, or by his administration's often ineffective, and in some key areas, entirely absent, implementation efforts.

Undoubtedly, President Clinton embraced the goals of nondiscrimination, social justice, and equal opportunity, and supported policies to address racial and ethnic tensions. Mr. Clinton's attempts to remove barriers to equal opportunity in federal programs reflect a clear vision to expand civil rights protections. However, successfully building his "bridge" and truly achieving his goal of "One America" will require greater commitment and allocation of resources than his administration was able to provide. It is up to the new President and his successors to more effectively invigorate civil rights enforcement and policy.

CHAPTER 1

Introduction: The Clinton Presidency in Perspective

"The United States has struggled to overcome the legacies of racism, ethnic intolerance and destructive Native American policies, and has made much progress in the past half century. Nonetheless, issues relating to race, ethnicity and national origin continue to play a negative role in American society. Racial discrimination persists against various groups, despite the progress made through the enactment of major civil rights legislation beginning in the 1860s and 1960s. The path toward true racial equality has been uneven, and substantial barriers still must be overcome."[1]

—U.S. Department of State, September 2000

With this report, the U.S. Commission on Civil Rights (Commission) evaluates the effect the Clinton administration had on the nation's progress in removing barriers to equal opportunity. In particular, the Commission identifies the effect the Clinton administration had on civil rights law enforcement and implementation and what remains to be done by the next administration to continue the nation's commitment to equal opportunity under the law.

This report does not offer a comprehensive evaluation of the civil rights issues and accomplishments of the past eight years, nor does it provide a history of civil rights policy. It does, however, provide a broad overview of civil rights-related issues from 1993 to 2000 and highlight the involvement of the Clinton administration. The topics covered in this report reflect many of the current significant and far-reaching issues related to civil rights law and enforcement. Further, this report places the civil rights record of the Clinton administration in perspective, taking into consideration the social and political background of the period in which President Clinton was in office.

THE CIVIL RIGHTS LANDSCAPE

On January 15, 2001, President William Jefferson Clinton submitted a report to Congress on the unfinished work of building "One America." Using the "bridge" metaphor to which he so often referred,[2] the President stated:

> For eight years, my Administration has worked to build social and economic bridges strong enough for all of us to walk across; and to celebrate our great diversity while united around our common humanity, values, and concerns. In a nation where soon the majority will be "American," I believe we need to talk about race in a new way—not just in terms of black and white, but of the essential worth and dignity of all people. Of course, racial tensions still exist in America. But, if we are ever going to overcome them, we must begin to focus more on the things that unite us than on those that divide us.[3]

The departing President's recommendations for continuing the process of building One America focused on economic and social progress, educational excellence for all children, civil rights enforcement, criminal justice reform, eliminating racial and ethnic health disparities, and voting reform.[4] In addition, the President also

[1] U.S. Department of State, *Initial Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination*, September 2000, accessed at <http://www.state.gov/www/global/human_rights/cerd_report/cerd_intro.html>.

[2] *See, e.g.*, William J. Clinton, "Remarks Accepting the Presidential Nomination at the Democratic National Convention in Chicago," Aug. 29, 1996, 32 WEEKLY COMP. PRES. DOC. 1577; William J. Clinton, "Remarks in Dyersburg, Tennessee," Aug. 31, 1996, 32 WEEKLY COMP. PRES. DOC. 1614; William J. Clinton, "Remarks at a Reception for Hillary Clinton in Martha's Vineyard, Massachusetts," Aug. 6, 2000, 36 WEEKLY COMP. PRES. DOC. 1800.

[3] President William J. Clinton, "Message to Congress: The Unfinished Work of Building One America," Jan. 15, 2001, accessed at <http://www.whitehouse.gov>.

[4] *See* app. C for the complete text of the President's recommendations.

stressed the importance of civic responsibility. The President recommended that the next administration maintain the White House Office on One America and reauthorize the National and Community Service Trust Act.[5] He concluded his recommendations by stating, "Every American should become engaged in the work of expanding opportunity for all and building One America."[6]

Throughout his presidency, Mr. Clinton worked to build the bridges that would lead the nation toward equality of opportunity. He did so by changing the direction of civil rights enforcement from previous eras. Although President Clinton attempted to become an active participant in the shaping and enforcement of civil rights policy, the results of his efforts in the arena of civil rights are mixed.[7]

The Pre-Clinton Civil Rights Era

The outcome of any presidency is due, in part, to the political climate and circumstances of the times. According to one scholar:

> The President operates in a highly complex and interrelated system or policy arena consisting of nongovernmental actors and government officials. If they choose, presidents may be the focal point for policy making. Presidents inherit ongoing policies that serve as a starting point for their administrations. While they may be able to set the agenda and formulate proposals, the modification and subsequent adoption of proposals and eventually their implementation are partly beyond the President's control.[8]

As such, President Clinton inherited a civil rights legacy from previous Presidents and was restricted in many ways by the actions of previous administrations. In the same way, President Clinton leaves his own legacy for the next administration.

1968 to 1976. According to one author, the post-Kennedy/Johnson era, the period between the late 1960s and the mid-1970s, "witnessed a clear break in presidential advocacy of civil rights."[9] Civil rights policy was focused on enforcement by federal agencies rather than legislation and court decisions. Both Richard Nixon and Gerald Ford gave less attention and support to civil rights issues than previous Presidents.[10] Both Presidents questioned the use of busing to achieve racially balanced schools and "hedged" on the issue of affirmative action in employment, although both supported the Equal Rights Amendment.[11] During this time, only three executive orders relating to civil rights were issued, and neither President Nixon nor President Ford took a particularly active role in proposing or supporting civil rights legislation.[12]

Significantly, however, the Nixon administration supported the Philadelphia Plan, an affirmative action program instituted by the Department of Labor that required contractors to set goals for minority hiring.[13] The plan, originally developed during the Johnson administration, was revised by the Nixon Labor Department to include minimum standards for the hiring of minorities under federal construction contracts.[14] Further, in 1969, President Nixon issued Executive Order 11246 requiring all federal agencies and departments to implement affirmative action programs and provide equal employment opportunity.[15]

1977 to 1980. Critics of President Jimmy Carter's civil rights agenda argue that "his

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[5] Clinton, "Message to Congress: The Unfinished Work of Building One America."

[6] Ibid.

[7] *See* chap. 3 for a discussion of both the successes and failures of President Clinton's civil rights policies and actions.

[8] Steven A. Shull, *American Civil Rights Policy From Truman to Clinton: The Role of Presidential Leadership* (Armonk, NY: M.E. Sharpe, 1999), pp. 51–52.

[9] Ibid., p. 37.

[10] Ibid.

[11] Ibid., pp. 37–38.

[12] Ibid., p. 38. President Nixon did, however, propose the Equal Educational Opportunities Act as an alternative to busing. This law introduced the notion of a proactive remedial plan to ensuring nondiscrimination and equal educational opportunity. U.S. Commission on Civil Rights (USCCR), *Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and Lau v. Nichols*, Equal Educational Opportunity Project Series, vol. III, November 1997, p. 83.

[13] Herman Belz, *Affirmative Action from Kennedy to Reagan: Redefining American Equality* (Washington, DC: Washington Legal Foundation, 1984), pp. 4–5; Judson MacLaury, *History of DOL, 1913–1988* (Washington, DC: U.S. Department of Labor, 1988), accessed at <http://www.dol.gov/dol/asp/public/programs/history/dolchp07.htm>.

[14] John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (Chicago: The University of Chicago Press, 1996), pp. 177–78, 193–98.

[15] Exec. Order No. 11,478, § 1 (Aug. 8, 1969) (set forth as a note under 42 U.S.C. § 2000e (1994)).

words spoke louder than his actions."[16] However, the Carter administration made several accomplishments in the realm of civil rights and equal protection. Not only did President Carter support the Equal Rights Amendment, his administration also issued the first regulations on Section 504 of the Rehabilitation Act, signed the Rehabilitation Act Amendments of 1978, and supported the inclusion of individuals with disabilities under the protections of the Fair Housing Act and Title VII of the Civil Rights Act of 1964.[17] President Carter also supported affirmative action programs, and his administration filed several *amicus* briefs in affirmative action cases.[18] Further, he appointed more African Americans, Hispanics, and women to federal leadership positions, including cabinet, subcabinet, White House, and judiciary positions, than any prior President.[19]

1981 to 1988. The Reagan administration has been characterized as departing from core civil rights legal values, including historical continuity, separation from politics, and the promotion of racial peace.[20] During the Reagan administration, the emphasis of civil rights enforcement was on blatant, intentional violations of civil rights laws. Accordingly, the concepts of disparate impact and discriminatory effect were de-emphasized in federal civil rights enforcement.[21] According to one author, "the Administration advocated that race or sex criteria should never be used for remedial purposes" and that affirmative action plans were not permissible under the Constitution or Title VII of the Civil Rights Act of 1964.[22] Further, the administration believed that only actual victims of discrimination, not other members of the groups to which victims belonged, should be provided any remedy.[23]

Nonetheless, President Reagan paid great attention to civil rights issues, bringing them to the forefront of national politics.[24] By opposing busing, affirmative action, and the aggressive enforcement of civil rights laws and reorganizing federal civil rights programs, President Reagan sought to shape civil rights policy to reflect his own ideological perspective.[25] However, critics have charged that he sought to reduce the role of government in the issue of civil rights by seeking to "end or ignore many government civil rights programs,"[26] which ultimately "halted progress and eroded previous gains" in civil rights.[27] Further, it is argued that President Reagan's conservatism in regard to civil rights issues resulted in "a decade of executive branch indifference and hostility toward the enforcement of employment discrimination laws" and other civil rights laws.[28] As one author stated:

> The fact that the direction of most Reagan actions was conservative—bucking a long-standing trend toward greater government enforcement to ensure equality—testifies to the effectiveness of this presi-

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[16] Shull, *American Civil Rights Policy From Truman to Clinton*, p. 39 (citing J.H. Shattuck, "You Can't Depend on It: The Carter Administration and Civil Liberties," *Civil Liberties Review*, vol. 4, no. 5 (January/February 1978), pp. 10–27).

[17] The White House, Office of the Chief of Staff, *The Record of Jimmy Carter*, 1980, p. 43, accessed at <http://www.nara.gov>.

[18] Ibid., p. 44.

[19] Ibid., pp. 40–41.

[20] *See, e.g.*, Joel L. Selig, "The Reagan Justice Department and Civil Rights: What Went Wrong," *University of Illinois Law Review*, no. 4 (1985), pp. 785–835. *But see* William Bradford Reynolds, "The Reagan Administration and Civil Rights: Winning the War Against Discrimination," response to Selig, *University of Illinois Law Review*, no. 4 (1986), pp. 1001–23. Selig served as an attorney in the Civil Rights Division of the Department of Justice from 1969 to 1973 and 1977 to 1983; Reynolds was the Assistant Attorney General from 1981 to 1988.

[21] Drew S. Days, III, "The Courts' Response to the Reagan Civil Rights Agenda," *Vanderbilt Law Review*, vol. 42 (1989), p. 1008. Days served as Assistant Attorney General for Civil Rights from 1977 to 1981.

[22] Ibid., p. 1009; Rita Ciolli, "Jury Out on Bush and Civil Rights; Marked Change from Reagan, but More Style than Substance?" *Newsday*, Feb. 6, 1990, p. 15.

[23] Days, "The Courts' Response to the Reagan Civil Rights Agenda," p. 1009.

[24] Shull, *American Civil Rights Policy From Truman to Clinton*, pp. 143–44.

[25] Steven A. Shull, *A Kinder, Gentler Racism? The Reagan-Bush Civil Rights Legacy* (Armonk, NY: M.E. Sharpe, 1993), p. 3.

[26] Shull, *American Civil Rights Policy From Truman to Clinton*, p. 39 (citing N.C. Amaker, *Civil Rights and the Reagan Administration* (Washington, DC: Urban Institute Press, 1988)); R.R. Detlefsen, *Civil Rights Under Reagan* (San Francisco: Institute for Contemporary Studies, 1991); G. Orfield and C. Ashkinaze, *The Closing Door: Conservative Policy and Black Opportunity* (Chicago: University of Chicago Press, 1991)).

[27] Shull, *American Civil Rights Policy From Truman to Clinton*, p. 118.

[28] William A. Wines, "Title VII Interpretation and Enforcement in the Reagan Years (1980–1989): The Winding Road to the Civil Rights Act of 1991," *Marquette Law Review*, vol. 77 (Summer 1994), p. 708.

dent. Presumably Reagan took risks in politicizing civil rights to a greater degree than done heretofore, but he suffered little political damage for it. Reagan used many administrative and judicial actions to further his policy preferences, such as putting hundreds of civil rights cases on hold. Ideology played a greater role in Reagan's policies on civil rights than, perhaps, it did in any other administration.[29]

1989 to 1992. Although effectively continuing many of the Reagan civil rights policies, President George H. W. Bush's civil rights agenda has been characterized as "discordant and often self-contradictory."[30] An example of this approach to civil rights is seen in his treatment of the Civil Rights Acts of 1990 and 1991. In 1990, President Bush vetoed the proposed Civil Rights Act of 1990, which, according to the Citizens' Commission on Civil Rights, "not only disappointed those who had looked to him to chart a course of new moral leadership in domestic policy, but also fanned the flames of racial intolerance and division."[31] However, the next year, under political pressure, President Bush signed the Civil Rights Act of 1991, essentially reversing his position on the legislation.[32]

Overall, President Bush did not deal effectively with issues of discrimination and racial tensions.[33] Despite the passage of the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991, presidential leadership in regard to civil rights issues during the Bush administration was weak.[34] According to one author:

> Bush settled on a distinctively nonideological approach toward civil rights. His civil rights strategy was consistently reactive and utilitarian. The White House never played a leading role in initiating civil rights reform: when forced to act, it sought either to maximize political advantage or to minimize political loss.[35]

It can be concluded, therefore, that President Clinton took over at a time that, with few exceptions, civil rights had suffered from inattention and neglect.

Civil Rights Themes of the Clinton Administration

The overarching theme of the Clinton administration's civil rights agenda was rhetorical commitment, not always supported by real enforcement action. Potentially innovative policy proposals were often tempered by ineffective and sometimes entirely absent policy implementation. In addition, political setbacks and exigency also shaped the outcomes of his efforts.

President Clinton articulated specific goals for furthering equal opportunity, nondiscrimination, social justice, and policies to address racial and ethnic tensions. However, some of his plans and initiatives either received minimal congressional support or were ineffectual in addressing the civil rights challenges of the 1990s. Other efforts resulted in only minimal success in such key areas as extending protections to ensure equal employment opportunity within the federal government work force. In other arenas, such as affirmative action and racial profiling, much more could have been accomplished. Nonetheless, the President did implement some noteworthy initiatives and supported certain efforts to extend protection in civil rights law.[36]

Even before his election in 1992, President Clinton identified race relations as one of the most pressing problems facing the United States. His campaign speeches highlighted plans for increasing diversity in government, improving civil rights enforcement, and breaking the cycle of poverty.[37] Later, throughout his presi-

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[29] Shull, *American Civil Rights Policy From Truman to Clinton*, p. 144.

[30] Neal Devins, "Reagan Redux: Civil Rights Under Bush," *Notre Dame Law Review*, vol. 68 (1993), p. 957. *See also* Shull, *American Civil Rights Policy From Truman to Clinton*, pp. 118–19.

[31] Citizens' Commission on Civil Rights (CCCR), *Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-Term*, 1991, p. 3.

[32] Shull, *American Civil Rights Policy From Truman to Clinton*, pp. 65, 96–100; Devins, "Reagan Redux," pp. 957, 982–99.

[33] CCCR, *Lost Opportunities*, p. 1. *See generally* Devins, "Reagan Redux."

[34] Shull, *American Civil Rights Policy From Truman to Clinton*, pp. 118–19.

[35] Devins, "Reagan Redux," p. 957.

[36] For example, President Clinton issued several executive orders addressing equal opportunity in federal programs, although these orders were not issued until late in his second term. Further, President Clinton supported legislation such as the Family and Medical Leave Act of 1994 and the Violence Against Women Act of 2000. However, other legislation supported by the President, including the Employment Nondiscrimination Act and health care reform efforts, were unsuccessful. *See* chap. 3.

[37] *See* Mickey Kaus, "RFK Envy; Clinton's bum rap," *The New Republic*, vol. 206, no. 26 (June 29, 1992), p. 13; "What the presidential candidates say they will do for you," *Ebony*,

dency, President Clinton made many references to improving race relations and diversity in the country. For example, true to his campaign promise, he appointed more women and minorities to key federal positions than ever before. In addition, his flagship effort, the President's Initiative on Race, represented a willingness—indeed the courage—to address the difficult issues facing the nation.

Nonetheless, despite the attention given to some civil rights issues, other key areas of civil rights remain virtually unchanged since the beginning of the 1990s. Some of the stagnation can be attributed to an autonomous Congress that did not embrace or act upon some initiatives, and acted on others too late. Therefore, it is important to identify those initiatives that succeeded, those that failed, and those that require the immediate and sustained attention of the next administration.

Continuing Relevance of the Fight for Civil Rights

"Despite gains in recent years in enacting several tough new laws, the condition of civil rights in America does not seem to be improving, and in fact, in many arenas, it is worse. Today, widespread prejudice adds to this nation's legacy of discrimination in depriving a great many of our citizens a fair chance to realize their aspirations and full potential as human beings. The injustices suffered by racial, ethnic and religious minorities, Native Americans, women, older citizens and persons with disabilities is truly a national disgrace. As a direct consequence, we see distrust, fear, and hatred sharply dividing and disrupting our diverse racial and ethnic communities, causing added misery and sapping precious resources. The need to resolve these deeply rooted problems is hardly a matter of special interests; it is a national imperative in the interest of all Americans."

—U.S. Commission on Civil Rights, letter to President Clinton, January 22, 1993

As the Commission noted in its letter to the new President in 1993, the condition of civil rights in America was, in many ways, worsening. The events of 1993 to 2000 offered both opportunity and challenge in the ongoing fight to enforce civil rights and ensure equal opportunity for everyone in America.[38] With the passage of new civil rights legislation in the early 1990s, it might have appeared that equal opportunity would be ensured once and for all.[39] But just as in the era of the enactment of sweeping civil rights laws, the mid-1960s, the nation has had to temper the promise of new laws with the entrenched patterns of old beliefs and behaviors.

In recent years, the nation has experienced, and the Commission has documented in great detail, the ongoing racial and ethnic tensions throughout the country and the continuing challenges faced by our federal, state, and local government officials as they try to fulfill their obligations to make the promise of civil rights laws a reality.[40] During the 1990s, many of the civil rights struggles that confronted the nation in previous decades persisted. Discrimination in the form of both disparate treatment and disparate impact continued in many areas, such as employment, higher education, and health care. As in the past, not only do discrimination and hate crimes infect everyday life in the 21st century, but major disparities between whites and minorities persist in health status, unemployment rates, wages, and other key indicators of overall well-being.[41] Although progress was made on some fronts, equality of opportunity remains an unfulfilled promise for many Americans.

Just as previous presidential administrations have done, throughout the 1990s the Clinton administration presided over great contradictory

vol. 47, no. 12 (October 1992), p. 120; Kenneth T. Walsh, "Thinking about tomorrow: the Clinton era begins," *U.S. News & World Report*, vol. 113, no. 19 (Nov. 16, 1992), p. 30; "Can Clinton turn it around? Evaluation of President-elect Bill Clinton's economic and social policies," *Ebony*, vol. 48, no. 3 (January 1993), p. 108.

[38] *See* app. A for a list of key civil rights-related actions by the President, the administration, Congress, and the courts between 1990 and 2000.

[39] In 1990, the Americans with Disabilities Act was passed, which introduced new prohibitions against discrimination for people with disabilities. The following year, the Civil Rights Act of 1991 codified a broad interpretation of Title VII discrimination prohibitions seriously challenged by the U.S. Supreme Court just two years before in cases such as *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).

[40] *See, e.g.*, USCCR, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination*, vols. I–V.

[41] *See generally* USCCR, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality*, September 1999; USCCR, *Overcoming the Past, Focusing on the Future: An Assessment of the U.S. Equal Employment Opportunity Commission's Enforcement Efforts*, September 2000.

impulses in the American character. Over the years, it has been part of the Commission's mission to document the incongruity that exists between the nation's laws and societal behaviors. This central and seemingly ever-present paradox is the most persuasive evidence that the work of the great civil rights movements of the past 40 years is not done and that laws that go unenforced really are not laws at all. Where the country goes from here, however, will be dictated in large part, not just by the ways in which President Clinton and his administration sought to meet the challenges of the past decade, but also by the ways they attempted to steer the country in the direction of an ever-stronger commitment to ensuring equal opportunity and access in housing, schools, workplaces, hospitals, and other social institutions. The Commission's assessment reveals that the Clinton years were strong on innovative efforts to steer the United States in that direction, even if the final results of these innovations were not entirely successful.

METHODOLOGY

To evaluate the Clinton administration's record on civil rights, the Commission reviewed public statements made by the President and presidential documents. The Commission also evaluated policies implemented by various federal agencies during the Clinton administration, as they related to civil rights. In addition, an extensive literature review was conducted, including analyses of the President's accomplishments and commentaries on the effectiveness of both the President and his administration. Further, past Commission reports were reviewed to determine if the recommendations of those reports had been implemented by the affected federal agencies during the Clinton administration.

Civil rights initiatives, successes, and failures during the Clinton presidency are presented below with an emphasis on the major contexts in which the effort to ensure equal opportunity remains a key issue for the nation. This study also recommends a civil rights agenda for the next administration. The broad areas addressed in this report are:

- diversity in the federal government (including political appointments, federally assisted and conducted programs, and federal employment);
- discrimination on the basis of sexual orientation and sex in the military;
- environmental justice;
- fair housing;
- minority farmers;
- equal educational opportunity;
- fair employment;
- equal access to health care;
- the impact of welfare reform on minorities;
- ensuring civil rights for indigenous groups;
- ensuring civil rights protections for immigrants;
- voting rights;
- the administration of justice with regard to sex, race, and ethnicity; and
- broad-based civil rights issues (including the President's Initiative on Race, census 2000, affirmative action, and disparate impact discrimination).

Elsewhere the Commission has conducted in-depth analyses of several of these issues.[42] While this report does not provide a comprehensive evaluation of the many civil rights issues challenging the nation, it does provide a sample of the most significant current civil rights issues and highlight the successes and failures of the Clinton administration with respect to civil rights.

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[42] *See, e.g.*, USCCR, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination*, vols. I–V; USCCR, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality*, September 1999; USCCR, *Overcoming the Past, Focusing on the Future*; USCCR, *Police Practices and Civil Rights in New York City*, August 2000; USCCR, *Equal Educational Opportunity Project Series*, vols. I–V; USCCR, *The Fair Housing Amendments Act of 1988: The Enforcement Report*, September 1994.

CHAPTER 2

Background: A Decade of Turmoil and Change

The civil rights record of the Clinton administration must be analyzed in conjunction with the social, cultural, and economic context of the 1990s. The United States that President Clinton presided over was one of social and economic change and inner turmoil. Like his predecessors, he had to balance the needs of the nation with the resources he had available. In some cases, he was able to push forward the cause for civil rights. In other instances, he did not push hard enough. In still other cases, political circumstance, ineffective Clinton administration policies, and other obstacles impeded the development and implementation of civil rights policies.

KEY CIVIL RIGHTS LAWS, JUDICIAL DECISIONS, AND AGENCY ENFORCEMENT IN THE 1990S

A fair assessment of the Clinton administration's efforts to shape civil rights law and policy must be viewed within the larger context of our nation's tripartite system of government. The tremendous power of Congress, the courts, and key federal agencies to influence the direction of the nation's civil rights enforcement efforts cannot be minimized.

The Legislative Branch. During the 1990s, Congress passed a significant amount of civil rights legislation. Among the most sweeping were the Americans with Disabilities Act of 1990[1] and the Civil Rights Act of 1991.[2] In 1992 and again in 1998, Congress also amended the Rehabilitation Act of 1973.[3] In addition, laws such as the Church Arson Prevention Act of 1996,[4] the Freedom of Access to Clinic Entrances Act of 1994,[5] and the National Voter Registration Act in 1993,[6] have further protected individuals' civil rights.

However, not all legislation passed during the Clinton administration furthered the cause of civil rights. For example, both the Personal Responsibility and Work Opportunity Reconciliation Act of 1996[7] and the Illegal Immigration Reform and Responsibility Act of 1996[8] had devastating effects on many immigrants.[9] Further, the Antiterrorism and Effective Death Penalty Act[10] severely limited the right to appeal of persons on death row.

The Judicial Branch. Throughout Clinton's presidency, federal judicial decisions also played a major role in reshaping civil rights laws and policies. For example, in 1995, the U.S. Supreme Court issued a seminal decision on affirmative action. In the case of *Adarand Constructors, Inc. v. Peña*,[11] the Court narrowed the ambit of affirmative action in holding that a plan setting aside specific business opportunities for minority firms was constitutionally permissible only if the government could show that it had a "compelling" reason for the plan and that the plan was

[1] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101–12213 (1994)).

[2] Pub. L. No. 102-66, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. §§ 1981, 2000 (1994)).

[3] Pub. L. No. 105-220, Title IV, § 4503, 112 Stat. 1111 (codified as amended at 29 U.S.C. § 701 *et seq.* (1994)).

[4] Pub. L. No. 104-294, Title VI, §§ 604(b)(14)(A), 607(a), 110 Stat. 3507, 3511 (codified at 18 U.S.C. § 241 (1994)).

[5] Pub. L. No. 103-259, 108 Stat. 694 (codified at 18 U.S.C. § 248 (1994)).

[6] Pub. L. No. 103-31, § 2, 107 Stat. 77 (codified at 42 U.S.C. § 1973gg (1994)).

[7] Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C §§ 1309–1397b and in scattered sections of 26, 42, and 47 U.S.C. (Supp. II 1996)).

[8] 8 U.S.C. § 1101 (1998).

[9] *See* chap. 3, pp. 49–51.

[10] Pub. L. No. 104-143, 100 Stat. 1214 (1996). *See* chap. 3, pp. 60–61.

[11] 515 U.S. 200 (1995).

"narrowly tailored" to meet that objective.[12] Moreover, in 1989, the Court indicated in *City of Richmond v. J.A. Croson Co.* that the goal of redressing societal discrimination is not a sufficiently "compelling" interest to undertake a race-conscious remedial plan.[13]

In February 2000, the U.S. Supreme Court ruled in *Rice v. Cayetano*[14] that the Office of Hawaiian Affairs (OHA), an agency created to administer programs for the benefit of Native Hawaiians, could not exclude non-Hawaiians from voting to elect the office's board of trustees. Although the U.S. government argued that OHA's Native Hawaiians-only voting limitation was based on the federal and state governments' recognition of their political relationship with indigenous peoples, the Court reversed the lower court's decision and held that the voting procedure violated the 15th Amendment.[15]

The Executive Branch. Under the Clinton administration, federal agency civil rights programs have been characterized by a rhetorical commitment to more vigorous law enforcement. For example, in July 1994, Attorney General Janet Reno issued a memorandum to heads of federal departments and agencies reiterating the importance of the use of the disparate impact standard in efforts to enforce civil rights mandates.[16] Federal civil rights enforcement agencies such as the U.S. Department of Justice's (DOJ) Civil Rights Division, the U.S. Equal Employment Opportunity Commission (EEOC), and the U.S. Department of Education's Office for Civil Rights (DOEd/OCR) also have played major roles in shaping civil rights policy during the Clinton administration.

However, in some areas, such as enforcing Title VI and litigating under disparate impact theory, the Clinton administration was less forceful. Further, President Clinton did not always expend sufficient effort to acquire adequate resources for the civil rights agencies to ensure proactive enforcement of the nation's civil rights laws.[17]

GROWING RACIAL AND ETHNIC TENSIONS DURING THE CLINTON ADMINISTRATION

Throughout Clinton's presidency, the nation continued to experience political divisiveness on such issues as affirmative action, equal pay, and immigration. And, as the events of the 1990s demonstrated, the nation is still in need of strong enforcement of civil rights laws.

Between 1992 and 2000, race-related stories saturated the news, including accounts of hate crimes, police brutality, and racial profiling. In February 2000, the results of a recently conducted Gallup Poll on race relations were released. The survey showed that African Americans continued to hold less positive views than white Americans on a variety of questions concerning fair treatment.[18] The poll also found that 51 percent of whites and 59 percent of blacks believe that "race relations will always be a problem."[19]

Through its extensive review of police practices, the U.S. Commission on Civil Rights identified several issues underlying the inability of officials responsible for the fair and equitable administration of justice to resolve racial conflicts and ensure civil rights.[20] These issues include human resources management policies (such as recruitment, selection, promotion, retention, and training); internal regulation; external controls; and legal remedies and devel-

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[12] 515 U.S. 200, 235–37. *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (applying the strict scrutiny standard to minority set-aside plans); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277–78 (1986) (plurality opinion) (applying the strict scrutiny standard in the education context). For a more detailed discussion of the *Adarand* decision, *see* chap. 3, pp. 69–70.

[13] 488 U.S. at 498–501 (stating that "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota"). *Id.* at 499.

[14] Rice v. Cayetano, 120 S. Ct. 1044 (2000), 146 F.3d 1075 *reversed*.

[15] *See id.*

[16] Janet Reno, Attorney General, Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance, re: Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964, July 14, 1994.

[17] *See generally* U.S. Commission on Civil Rights (USCCR), *Funding Federal Civil Rights Enforcement: 2000 and Beyond*, February 2001.

[18] The Gallup Organization, "Perceptions of Black and White Americans Continue to Diverge Widely on Issues of Race Relations in the U.S.," Feb. 28, 2000, accessed at <http://www.gallup.com/poll/releases/pr000228.asp>.

[19] Ibid.

[20] *See* USCCR, *Revisiting Who Is Guarding the Guardians? A Report on Police Practices and Civil Rights in America*, Executive Summary, November 2000; USCCR, *Police Practices and Civil Rights in New York City*, August 2000.

opments. The Commission concluded that law enforcement officers do not adequately reflect the communities they serve.[21] Many police forces have been unable to accomplish or sustain diversity, and, perhaps as a result, the general public continues to have negative perceptions of law enforcement personnel. To remedy this, the Commission recommended that law enforcement agencies develop strategies to increase diversity at all levels, improve public perception of law enforcement to attract more applicants, encourage applicants to have college degrees, eliminate bias in the selection system, and revise recruitment and selection methods.[22] In addition, the Commission recommended that law enforcement organizations review their promotion and rewards systems to ensure that they do not encourage personnel to engage in unlawful practices, such as racial profiling, in attempts to gain a promotion.[23]

Hate Crimes

A hate crime is defined in the Violent Crime Control and Law Enforcement Act of 1994 as a crime in "which the defendant intentionally selects a victim because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."[24] In 1998, the most recent year for which statistics are available, 7,755 hate crimes were reported to the Federal Bureau of Investigation (FBI).[25] Of these, more than half were motivated by racial bias. Religious bias was involved in 1,390 of the crimes, and 1,260 of the crimes were motivated by sexual orientation bias. An additional 754 of these crimes involved ethnicity/national origin bias.[26]

Several hate crimes receiving wide media attention have shocked the nation. In October 1998, a 21-year-old gay man, Matthew Sheppard, was brutally beaten to death near Casper, Wyoming.[27] That same year an African American man, James Byrd, was dragged by a truck to his death in Jasper, Texas.[28]

The following year, a 21-year-old member of a neo-Nazi group murdered two persons and wounded several others over three days.[29] On the first day, Friday, July 2, 1999, Ben Smith wounded six Orthodox Jews in West Rogers Park, Illinois, before murdering Ricky Byrdsong, an African American former Northwestern University basketball coach, in Skokie, Illinois.[30] The next day the suspect shot at two black men, injuring one of them, in Springfield, Illinois. That day he also wounded a black minister in Decatur, Illinois, and shot at six Asian American students in Urbana, Illinois, wounding one.[31] On Sunday, July 4, the same man killed Won Joon Yoon, a Korean American graduate student, in Bloomington, Indiana.[32] Later that evening, Ben Smith killed himself in a struggle with law enforcement officers.[33]

The next month, on August 10, 1999, a man walked into a Jewish community center in California with a 9mm semiautomatic pistol and

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[21] USCCR, *Revisiting Who Is Guarding the Guardians?* Executive Summary.

[22] Ibid.

[23] Ibid.

[24] 28 U.S.C. § 280 (1994).

[25] U.S. Department of Justice (DOJ), Federal Bureau of Investigation (FBI), "Hate Crimes," accessed at <http://www.fbi.gov/programs/civilrights/hatecrime.htm>. Hate crime statistics were reported by jurisdictions covering 80 percent of the population and only include those incidents that were reported to law enforcement agencies. Ibid. Further, according to DOJ's Community Relations Service, "findings on the exact number of hate crimes and trends are difficult to establish and interpretations about hate crimes vary among individuals, law enforcement agencies, public and private organizations, and community groups." DOJ, Community Relations Service (CRS), "Hate Crime: The Violence of Intolerance," accessed at <http://www.usdoj.gov:80/crs/pubs/htecrm.htm>.

[26] DOJ/FBI, "Hate Crimes," accessed at <http://www.fbi.gov/programs/civilrights/hatecrime.htm>.

[27] "Beaten Student Dies/Attack Spurs Calls for Hate-Crime Laws to Protect Gays," *Newsday*, Oct. 13, 1998, p. A7; Tom Kenworthy, "Gay college student who was beaten dies," *The Chicago Sun-Times*, Oct. 13, 1998, p. 20.

[28] James Harrington, "Only a few cities in Texas are serious about hate crimes," *The Dallas Morning News*, Oct. 23, 1998, p. 35A; Morgan Reynolds, "Should There Be special laws to Deal with Hate Crimes? Principle of Equal Justice a Tradition We Should Uphold," editorial, *The Sun-Sentinel* (Fort Lauderdale, FL), Nov. 9, 1998, p. A19.

[29] Southern Poverty Law Center, "1999 Hate Incidents: Illinois," accessed at <http://www.splcenter.org/intelligenceproject/ip-index.html>.

[30] Editorial, "Racism a mutating virus," *The Atlanta Journal and Constitution*, July 7, 1999, p. 18A; Cornelia Grumman and Ray Long, "Activists Trace Path of Racial Hatred, Group Rallies at Sites of Shootings by Benjamin Smith," *The Chicago Tribune*, July 23, 1999, Metro section, p. 1; Edward Walsh, "Racial Slayer Killed Himself in Struggle," *The Washington Post*, July 6, 1999, p. A1.

[31] Ibid.

[32] Ibid.

[33] Walsh, "Racial Slayer Killed Himself in Struggle," p. A1.

opened fire, wounding three children and two staff members.[34] An hour later, the gunman then killed Joseph Ileto, a Filipino American mailman.[35] The police classified the attacks as hate crimes.[36]

Other racially motivated crimes also are signals of virulent racial bias in many of the nation's localities.[37] The Southern Poverty Law Center estimates that there are about 457 hate groups operating in the United States, and has counted 305 hate sites on the Internet.[38] According to the Community Relations Service of the Department of Justice, almost two-thirds of the known perpetrators of hate crimes are teenagers or young adults.[39]

Racial Profiling

Adding to the already near-volatile tensions in the nation were concerns of racial profiling by law enforcement officers.[40] For example, the FBI was accused of racial and ethnic profiling and selective prosecution after Taiwan-born Wen Ho Lee, an Asian American scientist, was accused of, but not charged with, committing espionage.[41] Similarly, allegations of racial profiling by New Jersey State troopers surfaced after an incident on the New Jersey Turnpike involving two white officers shooting at a van occupied by black and Hispanic men.[42]

According to a 1999 report of the American Civil Liberties Union, racial profiling by law enforcement officers is a serious issue in the United States. The report stated:

> Race-based traffic stops turn one of the most ordinary and quintessentially American activities into an experience fraught with danger and risk for people of color. Because traffic stops can happen anywhere and anytime, millions of African Americans and Latinos alter their driving habits in ways that would never occur to most white Americans. Some completely avoid places like all-white suburbs, where they fear police harassment for looking "out of place." Some intentionally drive only bland cars or change the way they dress. Others who drive long distances even factor in extra time for the traffic stops that seem inevitable.[43]

Concerns over gender- and racially motivated crimes and racial profiling in police stops, investigations, and other law enforcement activities have added to the growing racial and ethnic tensions in the United States.

Police Misconduct

Police misconduct motivated by racial bias has been another prevalent problem. For example, on April 1, 1996, two sheriff's deputies from the Riverside County (California) Sheriff's Department were captured on videotape beating two suspected undocumented immigrants.[44] The

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[34] Rene Sanchez and Cassandra Stern, "Gunman Wounds 5 at Summer Camp," *The Washington Post*, Aug. 11, 1999, p. A1.

[35] Rene Sanchez, "L.A. Shooting Suspect Faces State, U.S. Charges; Mailman Was 'Target of Opportunity,'" *The Washington Post*, Aug. 13, 1999, p. A1.

[36] Ibid. As of November 2000, the suspect's trial had been postponed due to mental health issues involved with the case. *See* "Both Sides in Furrow Case Seek Trial Delay," *The Los Angeles Times*, Nov. 10, 2000, p. B4.

[37] For additional examples of hate crimes, *see* DOJ/CRS, "Hate Crime: The Violence of Intolerance," and Southern Poverty Law Center, "1999 Hate Incidents," accessed at <http://www.splcenter.org/intelligenceproject/ip-index.html>.

[38] Southern Poverty Law Center, "The Year in Hate," *Intelligence Report*, Winter 2000, accessed at <http://www.splcenter.org>.

[39] DOJ/CRS, "Hate Crime: The Violence of Intolerance."

[40] Racial profiling has been defined as "the tactic of stopping someone [for law enforcement purposes] only because of the color of his or her skin and a fleeting suspicion that the person is engaging in criminal behavior." Kenneth Meeks, *Driving While Black: Highways, Shopping Malls, Taxicabs, Sidewalks: What to Do if You are a Victim of Racial Profiling* (New York: Broadway Books, 2000), pp. 4–5.

[41] Lenny Savino, "Federal government facing charges of racial profiling," *The San Jose Mercury News*, Oct. 12, 2000, accessed at <http://ww.mercuryenter.com/from/docs1/profile1013.htm>. *But see* Janet Reno, Attorney General and Louis J. Freeh, FBI director, Statement, "Investigation and Prosecution of Dr. Wen Ho Lee," statement before the Senate Select Committee on Intelligence and the Senate Judiciary Committee, Sept. 26, 2000. Mr. Lee pleaded guilty to one count of mishandling classified documents. However, ex-CIA Director John Deutch was accused of the same offense but has not been charged. *See* Reuters, "Charges for Ex-CIA Boss?" Aug. 28, 2000, accessed at <http://www.ABCNews.com>; The Associated Press, "Investigation of Deutch Widens," Sept. 16, 2000, accessed at <http://www.ABCNews.com>; ABC News, "Total Disregard," Oct. 20, 2000, accessed at <http://www.ABCNews.com>.

[42] *See* The Associated Press, "Report N.J. Was Profiling in 1996," Oct. 12, 2000, accessed at <http://dailynews.yahoo.com/h/ap/20001012/us/nj_state_police_2.html>.

[43] David A. Harris, "Driving While Black: Racial Profiling On Our Nation's Highways," An American Civil Liberties Union Special Report, June 1999, accessed at <http://www.aclu.org/profiling/report/index.html>.

[44] *See* USCCR, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination, Volume V: The Los Angeles Report*, May 1999, p. 143 (citing

beating followed a high-speed chase after a truck fled from a checkpoint at the border. The videotape shows the deputies beating a man and a woman after other occupants ran from the truck. An audiotape indicates that the beating followed the Mexican nationals' failure to respond to the deputies commands in English to get out of the truck and raise their hands.[45]

On August 9, 1997, Haitian immigrant Abner Louima was assaulted and sodomized by police officers inside Brooklyn's 70th Police Precinct.[46] Mr. Louima suffered severe internal injuries and spent two months in the hospital recovering from this incident. One of the officers involved pleaded guilty to the attack and is serving a 30-year sentence. Another officer was convicted of violating Mr. Louima's civil rights by leading him into the bathroom of the 70th Precinct station and holding him down during the attack. In addition, three of the officers were found guilty of conspiracy to obstruct justice.[47]

Another incident receiving nationwide attention was the shooting death of a 22-year-old West African immigrant, Amadou Diallo, by New York City police. On February 4, 1999, Mr. Diallo was approached by four officers of the Street Crime Unit in front of his Bronx apartment building. The four police officers believed that Mr. Diallo fit the general description of a rape suspect for whom they were searching and that he was acting suspiciously. When Mr. Diallo reached for his wallet, the officers mistakenly believed he was reaching for a gun and shot him. Mr. Diallo had no prior criminal record and was not armed.[48] On March 31, 1999, the four officers were charged with second-degree murder of Mr. Diallo. The jury ultimately acquitted the four officers of all charges. The acquittals upset many people and further divided the city on issues of race, politics, and public safety.[49]

In its review of police practices, the Commission found problems with the internal regulation of law enforcement agencies, which diminished their ability to address police misconduct. The Commission concluded that clear guidance on the use of deadly force and the prohibition of racial profiling are needed.[50] Further, police departments must examine their internal affairs and disciplinary procedures to ensure fairness and justice.[51] Finally, there must be cooperation among police departments and external agencies and organizations concerning allegation of misconduct, adequate resources for investigations and legal remedies of police misconduct, and vigorous criminal prosecution of accused police officers.[52]

Disparities in Capital Punishment

Debate rages in the United States not only over whether the death penalty is acceptable,[53] but whether or not there is discrimination in sentencing decisions. Opponents of the death penalty note that both the quality of legal representation (often determined by one's socioeconomic status) and race (of both the perpetrator and the victim) determine whether or not a death sentence is handed down.[54] According to

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Kenneth Noble, "Before They Beat Mexicans, Police Gave Orders in English," *The New York Times*, Apr. 10, 1996, p. A12; "Taped Aliens' Beating Sparks Protests," *Facts on File World News Digest*, Apr. 11, 1996, p. 245.

[45] Ibid.

[46] *See* USCCR, *Police Practices and Civil Rights in New York City*, August 2000, pp. 7, 42 (citing "Louima Jurors Finish 3rd Day of Deliberations," The Associated Press, *Newsday*, Mar. 4, 2000, p. A16; "Three Officers Convicted in N.Y. Torture Case," The Associated Press, Mar. 6, 2000).

[47] USCCR, *Police Practices and Civil Rights in New York City*, p. 7.

[48] Ibid.

[49] Ibid.

[50] USCCR, *Revisiting Who Is Guarding the Guardians?* Executive Summary.

[51] Ibid.

[52] Ibid.

[53] International Human Rights Standards prohibit capital punishment. For example, in 1989, the United Nations adopted a protocol to the International Covenant of Civil and Political Rights calling for abolition of the death penalty in order to enhance "human dignity and progressive development of human rights." United Nations High Commissioner for Human Rights, "Second Optional Protocol to the International Covenant on Civil and Political Rights," aiming at the abolition of the death penalty, adopted Dec. 15, 1989, accessed at <http://www.unhchr.ch/html/menu3b/b/a_opt2.htm>.

[54] *See, e.g.*, American Civil Liberties Union, "The Death Penalty," Briefing Paper No. 14, Spring 1999, accessed at <http://www.aclu.org>; Amnesty International USA, *The Death Penalty in Georgia: Racist, Arbitrary and Unfair*, June 1996, accessed at <http://www.web.amnesty.org/ai/nsf/index/AMR510251996>; Richard C. Dieter, executive director, Death Penalty Information Center, "The Death Penalty in Black & White: Who Lives, Who Dies, Who Decides," June 1998, accessed at <http://www.deathpenaltyinfo.org/racerept.html>.

the American Civil Liberties Union (ACLU), "[w]ealthy people who can hire their own counsel are generally spared the death penalty, no matter how heinous their crimes. Poor people do not have the same opportunity to buy their lives."[55]

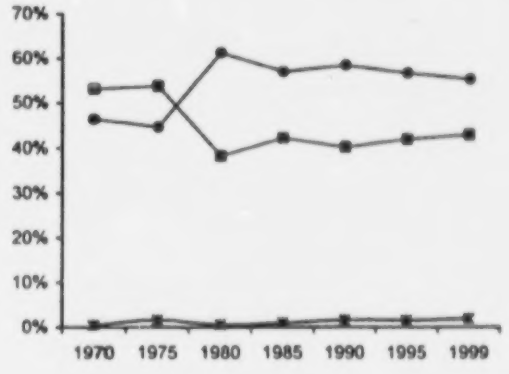
In addition, in the United States, use of the death penalty differs by state. In 1999, 38 states allowed capital punishment. The death penalty is also an option in federal cases.[56] However, 39 percent of the death row inmates are found in three states: California, Texas, and Florida.[57] Similarly, half of the defendants receiving the death penalty in 1999 were imprisoned in Texas, California, North Carolina, and Florida.[58] According to the ACLU, death sentences are rare in Connecticut and Kansas, while Southern states hand down more death sentences than other states. Such geographical differences prompted the ACLU to conclude, "Where you live determines whether you die."[59]

Statistics from the Bureau of Justice Statistics highlight the trends in both death sentences and executions. In 1999, 272 persons received the death sentence—38 percent were black and 58 percent were white.[60] Of the 98 individuals who were executed in 1999, 61 were white, 33 were black, two were American Indian, and two were Asian American.[61] Nine of the persons executed were Hispanic.[62] All of the persons executed in 1999 were men; two women were executed in 2000.

Although the percentage of African Americans under sentence of death has decreased over the past 30 years, African Americans still represent over 40 percent of the prisoners awaiting death (see figure 2-1).[63] In 1999, of the 3,527 inmates awaiting execution, 1,948 (55 percent) were white and 1,514 (43 percent) were black.[64] Compared with 1998, the number of black inmates under sentence of death rose by 25 and the number of white prisoners under sentence of death rose by 31.[65] Less than 1 percent of the prisoners under sentence of death were of other races: there were 28 American Indians, 24 Asian Americans, and 13 persons of "other races" on death row.[66] Nine percent of the prisoners awaiting execution in 1999 were Hispanic.[67]

FIGURE 2-1

Percent of Prisoners under Sentence of Death by Race, 1970–2000



SOURCE: U.S. Department of Justice, Bureau of Justice Statistics, "Number of Prisoners Under Sentence of Death, 1968–1999," accessed at <http://www.ojp.usdoj.gov/bjs/glance/drrace.txt>.

Amnesty International provides information on the racial characteristics of both victims and perpetrators when the death penalty is imposed. Data for 1997 reveal that although whites and blacks compose similar proportions of the total number of murder victims, the death sentence is more likely to be handed down when the victim is white.[68] Of the 572 cases in which defendants were given death sentences, 81.6 percent in-

[55] American Civil Liberties Union, "The Death Penalty," p. 1.

[56] U.S. Department of Justice, Bureau of Justice Statistics (BJS), "Capital Punishment 1999," *Bureau of Justice Statistics Bulletin*, NCJ 184795, December 2000, p. 3.

[57] BJS, "Capital Punishment 1999," p. 7.

[58] Ibid., p. 9.

[59] American Civil Liberties Union, "The Death Penalty," p. 1.

[60] BJS, "Capital Punishment 1999," p. 6, table 5.

[61] BJS, "Capital Punishment Statistics," accessed at <http://www.ojp.usdoj.gov/bjs/cp.htm>.

[62] BJS, "Capital Punishment 1999," p. 1. Hispanics can be of any race. Of the nine Hispanic prisoners who were executed, eight were white and one was American Indian. Ibid.

[63] BJS, "Number of Prisoners Under Sentence of Death, 1968–1999," accessed at <http://www.ojp.usdoj.gov/bjs/glance/drrace.txt>.

[64] BJS, "Capital Punishment 1999," p. 6, table 5.

[65] Ibid., p. 7.

[66] BJS, "Capital Punishment Statistics."

[67] BJS, "Capital Punishment 1999," p. 7, table 6.

[68] Amnesty International USA, "Death Penalty: Key Topics—Racial Discrimination in Executions," accessed at <http://www.amnesty-usa.org/amnesty/abolish/race.html>. Calculations based on data from the Bureau of Justice Statistics.

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volved white victims and 12.2 percent involved black victims.[69] In cases involving black victims and white perpetrators, only 2 percent of the cases resulted in death sentences. However, when both the victim and perpetrator were black, 28.9 percent of the defendants were sentenced to death (see table 2-1).[70]

TABLE 2-1

Death Sentences for Murder Cases by Race, 1997

Race/Ethnicity		Death sentences	
Defendant	Victim	Number	Percent
White	White	337	95.2
	Black	7	2.0
	Asian	2	0.6
	Hispanic	8	2.3
	Total	354	100.0
Black	White	130	59.6
	Black	63	28.9
	Asian	23	10.6
	Hispanic	2	0.9
	Total	218	100.0

SOURCE: Derived from data presented in Amnesty International USA, "Death Penalty: Key Topics—Racial Discrimination in Executions," accessed at <http://www.amnesty-usa.org/amnesty/abolish/race.html>.

Overall, the federal government's role in administering the death penalty in this country is small. The state governments executed more than 4,400 defendants from 1930 to1999; in this same period, the federal government executed 33 defendants, but has not executed any federal defendants since 1963.[71] In 1998, the states had 3,433 defendants pending death sentences, whereas the federal government had 33 federal defendants pending death sentences. Even with the expansion of the federal death penalty[72] the "federal defendants account for approximately one-half of one percent of all the defendants on death row in the United States."[73] The most common capital offenses charged to federal defendants are listed below: (1) the use of a gun to commit homicide during and in relation to a crime of violence or drug trafficking crime, (2) murder in aid of racketeering activity, and (3) murder in furtherance of a continuing criminal narcotics enterprise.[74]

SOCIOECONOMIC DISPARITIES IN THE 1990S

Several key indicators of overall economic well-being show that stark disparities by race, ethnicity, and gender have persisted into the 21st century. Measures of unemployment, mortality, and other indicators of social and economic well-being continue to show disparities by race, ethnicity, and gender. Although improvement has been made in several areas, overall, the nation remains divided along socioeconomic as well as racial and ethnic lines. Several examples of socioeconomic disparities are discussed in this section.

Education

More Americans than ever before are completing high school and college. Data for 1998 show that almost 83 percent of all Americans 25 years of age and older have completed high school.[75] However, there are drastic differences in educational attainment by race and ethnicity. In 1998, only 56 percent of Latinos had completed high school, and only 11 percent have completed four or more years of college.[76] Further, less than half of Mexican Americans have completed high school, and only 7.5 percent of Mexican Americans have completed college.[77]

[69] Ibid.

[70] Derived from data presented in Amnesty International USA, "Death Penalty: Key Topics—Racial Discrimination in Executions."

[71] U.S. Department of Justice, *The Federal Death Penalty System: A Statistical Survey (1988–2000)*, Sept. 12, 2000, p. 9.

[72] In 1972, the Supreme Court issued a ruling that nullified capital punishment throughout the country. Unlike many of the state legislatures that quickly revised their state statutes, the federal government did not make any revisions to death penalty procedures until 1988, when the Anti-Drug Abuse Act was signed. This act included the Drug Kingpin Act, which made certain drug-related offenses punishable by the death penalty. The Violent Crime Control and Law Enforcement Act 1994 broadened the number of federal offenses that could be punishable as capital crimes. The federal offenses to which the death penalty could be applicable increased again in 1996, when the Antiterrorism and Effective Death Penalty Act went into effect. Ibid., p. 1.

[73] Ibid., p. 5.

[74] Ibid., p. 13.

[75] U.S. Department of Commerce, Bureau of the Census (Census), *Statistical Abstract of the United States: 1999*, p. 169, table 263.

[76] Ibid.

[77] Ibid.

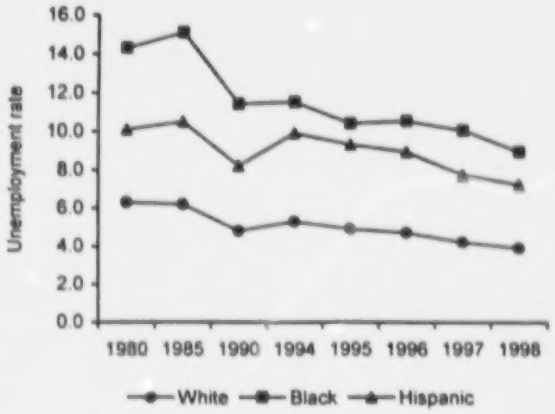
Comparatively, 84 percent of white Americans are high school graduates and 25 percent are college graduates. Among African Americans, 76 percent have completed high school or more, but only 15 percent have completed college.[78] Almost 85 percent of Asian Americans and Pacific Islanders have completed high school, and more than 40 percent of this population have completed college.[79] Among American Indians, 63 percent have completed high school, yet only 2.1 percent have completed four or more years of college.[80]

Unemployment

Although the overall unemployment rate has remained low for several years, the unemployment rate for African Americans is high compared with other groups (see figure 2-2).[81] The unemployment rate for African Americans in early 2000 was 7.8, compared with 3.6 for whites and 5.7 for persons of Hispanic origin.[82] There are within-group differences as well. Among Hispanics, Mexican Americans and Cuban Americans have lower unemployment rates, 7.7 and 6.6, respectively. Puerto Ricans, however, have an unemployment rate of 9.8.[83]

FIGURE 2-2

Unemployment Rate by Race and Ethnicity, 1980–1998



SOURCE: U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1999*, 1999, p. 430, table 680.

Poverty

Statistics from the Census Bureau indicate that poverty in the United States is at a 20-year low, and median household incomes are at their highest levels ever.[84] In 1999, 32.3 million Americans were poor, down from 34.5 million in 1998. About 80 percent of the net decline in the number of people living in poverty occurred in central cities, where only 41 percent of all poor people live.[85]

While most groups experienced declines in the number of individuals living in poverty, disparities across racial and ethnic categories are still apparent. In 1999, 23.6 percent of African Americans lived in poverty, compared with 7.7 percent of non-Hispanic whites.[86] Comparatively, 12.5 percent of Asian Americans and Pacific Islanders lived in poverty in 1999. That

[78] Ibid.

[79] Ibid. The most recent year for which educational attainment data are available for Asian Americans and Pacific Islanders in the *Statistical Abstract* is 1997.

[80] Census, "Table 2. Selected Social and Economic Characteristics for the 25 Largest American Indian Tribes: 1990," accessed at <http://www.census/gov/population/socdemo/race/indian/ailang2.txt>. The most recent data for educational attainment are for 1990.

[81] Census, *Statistical Abstract of the United States: 1999*, p. 430, table 680.

[82] U.S. Department of Labor, Bureau of Labor Statistics, "The Employment Situation: February 2000," table A. Data are based on the Current Population Survey. Estimates are not available for Asian Americans and Pacific Islanders or American Indians and other Native Americans.

[83] Census, *Statistical Abstract of the United States: 1998*, p. 404, table 646. Data are for 1997.

[84] Census, "Poverty Rate Lowest in 20 Years, Household Income at Record High, Census Bureau Reports," Sept. 26, 2000, accessed at <http://www.census.gov/Press-Release/www/2000/cb00-158.html>.

[85] Census, "Poverty: 1999 Highlights," Sept. 26, 2000, accessed at <http://www.census.gov/hhes/poverty/poverty99/pov99hi.html>.

[86] Census, "Poverty Rate Lowest in 20 Years, Household Income at Record High, Census Bureau Reports."

same year, 22.8 percent of Hispanics (of any race) were living in poverty.[87] American Indians and Alaska Natives experienced the highest poverty rate of all racial and ethnic groups, with 25.9 percent living in poverty.[88]

Mortality

Another measure of disparity is the difference in mortality by race and gender. The total death rate (deaths from all causes) is 491.6 deaths per 100,000 people.[89] However, the death rate for males is 623.7 and for females only 381.0. Blacks, however, have a much higher death rate (738.3) than all other racial/ethnic categories. As an aggregate group, Asian American/Pacific Islanders have the lowest death rate (277.4).[90] However, Hawaiians and Samoans have higher death rates than blacks, whites, and American Indians, according to a study of seven states with large Asian and Pacific American populations.[91]

Death rates for certain diseases also show great disparities. For example, the death rate for diabetes for blacks (28.8) and American Indian/Alaska Natives (27.8) is more than twice that of whites (12.0) and greater than that of other minority groups.[92] Blacks are significantly more likely to die from heart disease, cancer, HIV, and homicide/legal intervention than are other groups.[93]

Although life expectancy for all Americans has increased by almost 30 years since the turn of the century, there are still differences by race and gender.[94] For example, women, overall, can expect to live longer than men, but while white women have an average life expectancy of 79.7 years, the average life expectancy for black women is 74.2 years. White males can expect to live 73.9 years, compared with only 66.1 years for black males.[95]

Demographic Change in the 1990s and Beyond

One of the most significant changes in the United States during the 1990s, from a civil rights perspective, is the increasing diversification of the nation. This change brings with it a departure from regarding diversity as a moral imperative or legal requirement to the recognition of the social, economic, and political advantages that a plural society makes possible, which signals a need for increased diligence in enforcing civil rights laws.

Statistical forecasts from the Current Population Survey indicate that between 1998 and 2008 the African American population will grow at an annual rate of 1.7 percent, while other minority groups will grow at a rate of 3.5 percent. The population of persons of Hispanic origin will grow by 3.2 percent; comparatively, the white population will grow by less than 1 percent.[96] By mid-century, blacks will represent 13 percent of the population. Asian/Pacific Islanders and American Indians will account for 9 percent and 1 percent of the population, respectively (see table 2-2). Persons of Hispanic origin will compose 24 percent of the population.[97]

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[87] Ibid.

[88] Ibid. The poverty rate for American Indians and Alaska Natives is a three-year average, covering the years 1997 to 1999. Because this population is relatively small, a multiyear average provides more reliable estimates. The first year the Census Bureau estimated poverty data for American Indians and Alaska Natives was 1999. Ibid.

[89] The death rate represents the number of deaths in a population divided by the total population at midyear. Death rates are expressed as the number of deaths per 100,000 people. U.S. Department of Health and Human Services, National Center for Health Statistics, *Health, United States, 1998 with Socioeconomic Status and Health Chartbook*, 1998, app. II, p. 442 (hereafter cited as NCHS, *Health, U.S., 1998*).

[90] Ibid., p. 203.

[91] Donna L. Hoyert and Hsiang-Ching Kung, "Asian or Pacific Islander Mortality, Selected States, 1992," *Monthly Vital Statistics Report*, National Center for Health Statistics, vol. 46, no. 1, supplement (Aug. 14, 1997), p. 11.

[92] Ibid.

[93] Ibid. *See* USCCR, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality*, September 1999, vol. I, chap. 2.

[94] NCHS, *Health, U.S., 1998*, p. 200.

[95] Ibid. Source did not provide data for other racial and ethnic categories. *See also* USCCR, *The Health Care Challenge*, vol. I, chap. 2.

[96] Howard N. Fullerton, Jr., "Labor Force Projections to 2008: Steady Growth and Changing Composition," *Monthly Labor Review*, November 1999, pp. 19–32.

[97] Census, "Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 1999 and 2000," Jan. 13, 2000, accessed at <http://www.census.gov/population/projections/nation/summary/np-t5-a.txt>; Census, "Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2025–2045," Jan. 13, 2000, accessed at <http://www.census.gov/population/projections/nation/summary/np-t5-f.txt>; Census, "Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2050–2070," Jan. 13, 2000,

TABLE 2-2

Percent Distribution of the Resident Population by Hispanic Origin Status, 1980 and 1990 and Projections 2000 and 2050

Race/Ethnicity	1980	1990	2000	2025	2050
White, Non-Hispanic	79.9	75.7	71.4	62.0	52.8
Black, Non-Hispanic	11.5	11.8	12.2	12.9	13.2
American Indian/Eskimo/Aleut, Non-Hispanic	0.6	0.7	0.7	0.8	0.8
Asian/Pacific Islander, Non-Hispanic	1.6	2.8	3.9	6.2	8.9
Hispanic	6.4	9.0	11.8	18.2	24.3
Total	100%	100%	100%	100%	100%

SOURCES: U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1999*, 1999, table 19, p. 19; Census, "Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 1999 and 2000," Jan. 13, 2000, accessed at <http://www.census.gov/population/projections/nation/summary/np-t5-a.txt>; Census, "Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2025–2045," Jan. 13, 2000, accessed at <http://www.census.gov/population/projections/ nation/summary/np-t5-f.txt>; Census, "Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2050–2070," Jan. 13, 2000, accessed at <http://www.census.gov/population/projections/nation/summary/np-t5-g.txt>. Totals may not add to 100 percent due to rounding.

Before the end of the century there will no longer be a white majority. These changes in the makeup of the nation call for a shift in civil rights enforcement and strategy. It is therefore crucial that the progress made during the Clinton administration be continued by the next administration, and that problems, such as disparities in health status, education, and employment, be addressed immediately.

accessed at <http://www.census.gov/population/projections/nation/summary/np-t5-g.txt>. Totals may not add to 100 percent due to rounding.

CHAPTER 3

An Evaluation of President Clinton's Civil Rights Record, 1993–2001

"Clinton governs at a time when the entire cause of civil rights is under furious attack. Housing patterns segregated by race and class produce schools that are more separate and unequal than ever. Voting rights representation has been set back by conservative judges. Young African-Americans are the target of a unrelenting campaign of demonization; many are victims of sentencing practices that official commissions decry as discriminatory. Poverty has been painted with a black face, so many poor mothers and children—black, brown and white—will suffer from the repeal of welfare. Inner cities have essentially been written off."[1]

—Jesse Jackson, 1997

INTRODUCTION

President Clinton, like many of his predecessors, significantly influenced the nation's efforts to further the goals of equal opportunity.[2] His civil rights-related activities and initiatives during his eight years as President ranged from the symbolic, such as remarks commemorating National African American History Month, National Equal Pay Day, Jewish Heritage Week, and Older Americans Month, to the unprecedented, such as the Initiative on Race and efforts to tackle discrimination against gay men and lesbians in the U.S. military. In addition to establishing programs and initiatives aimed at reducing and eliminating discrimination, the Clinton administration carried out and/or continued several policies and programs that were begun in the previous administration. In the closing months of his presidency, President Clinton strengthened his efforts to make the federal government a model workplace by focusing on efforts to eradicate discrimination not only on the basis of already protected classifications such as disability, but on the basis of new protected classifications such as sexual orientation and parental status.

Overall, despite political circumstances that were sometimes beyond its control, the Clinton administration's record on civil rights demonstrates a commitment, though often rhetorical, to advancing the goals of equal opportunity, as well as some success in extending the coverage of nondiscrimination prohibitions in federal law to include more protected classifications, and working to ensure a more vigorous federal civil rights enforcement effort. An assessment of the Clinton administration's civil rights record reveals three resonant themes. The first is a willingness to venture into new territory. President Clinton proved himself willing to challenge the status quo in some areas through a variety of means. For example, he sought to address issues ranging from gays and lesbians in the military to discrimination in the federal work force to affirmative action. He did so by availing himself a wide range of mechanisms at his disposal: executive order, presidential proclamation, White House memoranda, the Attorney General and the Department of Justice, and, in some instances, congressional lobbying. In some cases, the President took strong action. However, in some areas, the President was not as aggressive. For example, the President did not fight hard enough to gain significant—and needed—increases in the federal civil rights budget.[3]

[1] Jesse Jackson, "Civil rights gone wrong: impact of California Proposition 209 on colleges," *The Nation*, vol. 264, no. 22 (June 9, 1997), p. 5.

[2] *See* Steven A. Shull, *American Civil Rights Policy From Truman to Clinton: The Role of Presidential Leadership* (Armonk, NY: M.E. Sharpe, 1999).

[3] *See generally* U.S. Commission on Civil Rights (USCCR), *Overcoming the Past, Focusing on the Future: An Assess-*

The second theme of the Clinton civil rights record relates not to the intrinsic quality of his efforts but to the political circumstances that helped characterize his tenure in office. For much of his presidency, Clinton faced opposition in Congress to his civil rights policy goals. For example, the Clinton administration supported the Employment Nondiscrimination Act, which would have extended the nondiscrimination prohibition of Title VII to cover sexual orientation. The failure of this legislation to pass during the Clinton administration reflects more on the lack of congressional support for its passage than on the administration's commitment to extending the coverage of major civil rights statutes.

Third, the civil rights efforts of the Clinton administration sometimes were hampered by ineffective or nonexistent policy implementation. There were some areas in which President Clinton's policies did not further, or even eroded, civil rights protections for some individuals. Prime examples of this tendency are the ineffective policy on gays in the military, the "war on drugs," and the signing of the Illegal Immigration Reform and Responsibility Act of 1996 without ensuring that civil rights interests were safeguarded, resulting in unfortunate consequences for many immigrants living in the United States.

While some of the Clinton administration's efforts affected the direction of the nation's civil rights policy agenda, other problems that arose during the Clinton administration impeded the agenda's momentum. For example, the distracting events that led up to and culminated with President Clinton's impeachment and trial in the Senate during 1998–1999 hindered the administration's efforts to pursue the political agenda the President set forth at the beginning of his second term. Nonetheless, in the closing months of his presidency, Clinton continued to fight for a few core elements of that agenda, such as a patients' bill of rights and expanded Medicare coverage for senior citizens. Unfortunately, the damage inflicted on his presidency by the events of 1998–1999 and the short time remaining to him in office combined to prevent President Clinton from fully realizing these objectives.

ment of the U.S. Equal Employment Opportunity Commission's Enforcement Efforts, September 2000.

Significant Civil Rights Issues of the Clinton Administration

The Clinton administration stated that it was guided by three values: "building a *community* of all Americans; creating *opportunity* for all Americans; and demanding *responsibility* from all Americans."[4] In many ways, these values were reflected in the words and actions of President Clinton. However, in some areas, President Clinton's efforts did not open the doors to equal opportunity.

Diversity in the Federal Government

Political and Judicial Nominees and Appointees

The Commission acknowledges President Clinton's ground-breaking efforts to diversify the highest ranks of the federal government. He was true to his pledge of increasing the diversity of both the federal judiciary and the cabinet. On several occasions, however, the President's candidates for these positions met with resistance from Congress in the form of rejection or significant delays in approval.

The presidential appointment process has evolved into a standardized process over the past 40 years. Following the 1960 election of President John F. Kennedy, there was no formal mechanism for nominating individuals for high-level government positions.[5] Today, however, the process involves several formal and informal steps. Generally, after an election, the president-elect and his aides begin to consider individuals for certain positions. According to the Presidential Appointee Initiative, a joint project between the Brookings Institution and the Heritage Foundation, during this phase the new President usually is "deeply involved and many of the people selected for high-level positions are well-known to him."[6] After the President is sworn in, however, often he is less personally involved in the selection of the thousands of political appointees that will serve during his administra-

[4] The White House, "A Nation Transformed: Clinton-Gore Administration Accomplishments, 1993–2000," *The Clinton-Gore Administration: A Record of Progress*, accessed at <http://clinton4.nara.gov/WH/Accomplishments/additional.html> (emphasis in original).

[5] The Presidential Appointee Initiative (the Brookings Institution and the Heritage Foundation), "What Is The Presidential Appointment Process?" 2000, accessed at <http://www.appointee.brookings.org/resources/description_apptprocess.htm>.

[6] Ibid.

tion.[7] The selection of nominees also can be heavily influenced by political parties, interest groups, Congress, and other bodies.[8]

In addition, different administrations have taken different approaches to the selection of nominees for political positions.[9] For example, the Clinton administration has followed the historical practice of "senatorial courtesy" in selecting nominees for district court judges.[10] Usually, the senior Democratic senator from the state with a vacancy has recommended candidates for the position. Then, the President and the Department of Justice screened the candidates before the President made his selection.[11] Unlike its predecessors, the Clinton administration sought only one recommendation for each vacancy. Formerly, three candidates were suggested.[12]

Similarly, with nominees for federal courts of appeals, the Office of Counsel at the White House, senators, and other appointees have provided input into potential candidates.[13] According to the Citizens' Commission on Civil Rights, this process:

> represents a noticeable change from the practice followed under President Bush, when the Republican Party controlled the presidency and the Democrats controlled the Senate. At that time, there was little consultation with Democratic senators prior to nominations, and the Democratic-controlled Senate Judiciary Committee informally ended the practice under which a nominee's home-state senator could indefinitely delay or "blue-slip" a nominee.[14]

Once the candidate list is narrowed for appointee positions, reference and background checks are made. The Office of the Counsel to the President oversees this phase, coordinating with the Federal Bureau of Investigation, the Internal Revenue Service, and the Office of Government Ethics. Once the candidates complete this stage, the Office of Presidential Personnel submits the nominations to the Senate through the Office of the Executive Clerk.[15] Next, the appropriate Senate committees hold confirmation hearings and vote on the nominees. Confirmation then moves to the full Senate for a vote. If the nomination is approved, the President signs the appointment and the official is sworn in.[16]

Despite the seemingly orderly process of appointments, it has been criticized for its political nature and the length of time it takes to complete. As one legal scholar noted, one cause of the "confirmation mess" is the "pervasive and growing influence [of the Supreme Court] on the lives of every American."[17] A recent report by the Presidential Appointee Initiative characterized the appointment system as a process on the verge of collapse.[18] Several former political appointees surveyed for the report stated that the appointment process was confusing and embarrassing.[19] Appointees during the Reagan, Bush, and Clinton administrations felt that the process took longer than necessary at every step—from the President's approval of the candidate to Senate confirmation. The study also found that delays in confirming appointments have increased since 1984.[20]

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[7] Ibid.

[8] *See generally* Shull, *American Civil Rights Policy From Truman to Clinton*, pp. 44–52; 139–45. *See also* William G. Ross, "The Supreme Court Appointment Process: A Search for a Synthesis," *Albany Law Review*, vol. 57 (Fall 1994), p. 995.

[9] *See* Elliot Mincberg and Tracy Hahn-Burkett, "Judicial Nominations and Confirmations During the First Half of the Second Clinton Administration," chap. VI in Citizens' Commission on Civil Rights (CCCR), *The Test of Our Progress: The Clinton Record on Civil Rights*, 1999.

[10] Ibid., p. 60.

[11] Ibid.

[12] The University of Virginia, the Miller Center of Public Affairs, *Improving the Process of Appointing Federal Judges: A Report of the Miller Center Commission on the Selection of Federal Judges*, 1996, p. 5.

[13] CCCR, *The Test of Our Progress*, p. 60.

[14] Ibid., pp. 60–61.

[15] The Presidential Appointee Initiative, "What Is The Presidential Appointment Process?"

[16] Ibid.

[17] Ross, "The Supreme Court Appointment Process," p. 995.

[18] The Presidential Appointee Initiative, *The Merit and Reputation of an Administration: Presidential Appointees on the Appointment Process*, A Report on a Survey Conducted by Princeton Survey Research Associates on Behalf of the Presidential Appointee Initiative, Apr. 28, 2000, p. 3, accessed at <http://www.appointee.brookings.org/survey.htm>.

[19] Ibid., p. 4.

[20] Ibid.

It is under these circumstances that President Clinton made his nominations for executive branch, cabinet-level, and judiciary positions. According to one author:

> [Clinton] made greater efforts than any prior president to attain diversity and it was a stated goal for administration hiring. Perhaps as a result of this effort, he experienced considerable delays in making some nominations (angering some liberal groups) and, accordingly, further delays in a conservative Senate once his nominees were put forward. Inevitably, nominating more minorities and women meant a higher percentage of liberal candidates than is true for most presidents. . . .
>
> In some ways it might seem surprising that there was relatively little criticism of this major effort, particularly in light of the growing disapproval of affirmative action. Despite some grumbling and delay in the Senate, most appointees for the executive branch were approved relatively quickly. Judicial appointments were another matter, where delays were considerable, perhaps due to the lifetime tenure of federal judges.[21]

Executive Branch and Cabinet-Level Positions

President Clinton appointed more minorities and women to top federal government positions than any other President. Prior to the Clinton administration, President Carter was the only President to espouse a commitment to diversifying the federal government.[22] Neither President Reagan nor President Bush appointed as many women and minorities as did President Carter, although President Bush did appoint more blacks and women than President Reagan. None of the previous Presidents, however, made appointments as diverse as those of President Clinton, particularly in cabinet positions.[23]

TABLE 3-1

Number of Minorities Appointed to Cabinet Positions

Administration	Hispanic	African American	Asian
Carter	0	1	0
Reagan	1	1	0
Bush	2	1	0
Clinton	5	7	1

SOURCES: Jessie Carney Smith, *Blacks First 2,000 Years of Extraordinary Achievement* (Gale Research, Inc., 1994) pp.159, 160, 165; Amy L. Unterburger and Jane L. Delgado *"Who's Who Among Hispanic Americans 1994–1995*, 3rd ed. (Gale Research, Inc., 1994), pp. 148, 467; The White House, "The Clinton-Gore Administration: A Record of Progress, accessed at <http://clinton4.nara.gov/WH/Accomplishments/additional.html>.

His appointments to high-level federal government positions included:

- *African Americans.* President Clinton appointed four African Americans to cabinet positions during his first term and three during his second term. In 2000, three African Americans served in cabinet positions: Rodney Slater, Secretary of Transportation; Togo West, Jr., Secretary of Veterans Affairs; and Alexis Herman, Secretary of Labor. Other African Americans previously in cabinet positions during the Clinton administration included Mike Espy, Secretary of Agriculture; Hazel O'Leary, Secretary of Energy; and Ron Brown, Secretary of Commerce. In addition, Lee P. Brown was the director of the Office of Drug Policy Control.[24]
- *Asian Americans.* Asian Americans also were appointed to several high-level Clinton administration leadership positions. Norman Mineta, became the first Asian American to be appointed to a cabinet position when he was named Secretary of Commerce; Bill Lann Lee, Assistant Attorney General for Civil Rights; and Donna A. Tanoue, chair, Federal Deposit Insurance Corporation. Other Asian American Clinton appointees included Nancy-Ann Min, administrator of the Health Care Financing Administration, Department of Health and Human Services; Maria Haley, director and board member,

[21] Shull, *American Civil Rights Policy From Truman to Clinton*, pp. 127–28.

[22] Ibid., p. 125. Carter appointed more African Americans, Hispanics, and women to federal leadership positions than any prior President. The White House, Office of the Chief of Staff, *The Record of Jimmy Carter*, 1980, pp. 40–41, accessed at <http://www.nara.gov>.

[23] Shull, *American Civil Rights Policy From Truman to Clinton*, p. 127. Thirteen percent of President Bush's appointees were black, including the chair of the Joint Chiefs of Staff and the Secretary of the Department of Health and Human Services; women accounted for 19 percent of the Bush administration appointees. Ibid., pp. 127–28.

[24] *See* the White House, "President Clinton and Vice President Gore: Supporting African Americans," *The Clinton-Gore Administration: A Record of Progress*, accessed at <http://clinton4.nara.gov/WH/Accomplishments/african.html>.

Export Import Bank; Paul M. Igasaki, vice chair, Equal Employment Opportunity Commission; Rose M. Ochi, director, Office of Community Relations, Department of Justice; and Ginger Ehn Lew, deputy administrator of the Small Business Administration.[25]

- *Hispanic Americans.* Seven percent of the cabinet seats were held by Hispanic Americans. Hispanic appointees during the Clinton administration included Bill Richardson, Secretary of Energy; Federico Peña, Secretary of Transportation; Henry Cisneros, Secretary of Housing and Urban Development; Aida Alvarez, administrator, Small Business Administration; Louis Caldera, Secretary of the Army; Norma Cantú, Assistant Secretary for Civil Rights, Department of Education; Ida Castro, chair, Equal Employment Opportunity Commission; and George Muñoz, president and CEO of the Overseas Private Investment Corporation.[26]
- *Native Americans.* Native Americans appointed to federal positions during the Clinton administration included Ada Deer, Assistant Secretary for Indian Affairs; Kevin Gover, Assistant Secretary for Indian Affairs; Michael Trujillo, director, Indian Health Service, Department of Health and Human Services (HHS); Gary Kimble, commissioner for the Administration for Native Americans, HHS; Joy Harjo, member, National Council on the Arts; and Montie Deer, chair, National Indian Gaming Commission, Department of the Interior.[27]
- *Gays and Lesbians.* President Clinton was the first President to appoint openly gay or lesbian persons to administration posts. The President nominated more than 150 openly gay or lesbian persons, and openly gay or lesbian appointees included Bruce Lehman, director, U.S. Patent and Trademark Office; and Roberta Achtenberg, Assistant Secretary of Housing and Urban Development. Several White House positions were also staffed with gays and lesbians, including Karen Tramontano, assistant to the president and counselor to the chief of staff; Daniel C. Montoya, executive director of the Presidential Advisory Council on HIV/AIDS; and David Tseng, chief of staff, National Economic Council.[28]
- *Women.* President Clinton appointed more women than any other President. Forty-four percent of Clinton appointees were women, and 29 percent of the positions requiring Senate confirmation were held by women during the Clinton administration. In addition to the women named above, President Clinton's appointments included Donna Shalala, Secretary of Health and Human Services; Carol Browner, administrator of the Environmental Protection Agency; and Janice LaChance, director, Office of Personnel Management. Further, Janet Reno served as the first female Attorney General and Madeleine Albright was the first woman to serve as Secretary of State.[29]

Federal Judiciary

The Commission recognizes the work of President Clinton in ensuring that women and minorities are represented in the federal judiciary. Eight years after President Clinton pledged to appoint more minorities and women as federal judges, the bench is more diverse than ever—15 percent of the judges are minorities and 20 percent are women, much higher percentages than in 1993.[30]

Throughout his presidency, Clinton was criticized for his inability to get judicial and other nominations through Congress. A *U.S. News & World Report* article in 1997 noted that "[w]ell

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[25] *See* the White House, "President Clinton and Vice President Gore: Supporting Asian Americans," *The Clinton-Gore Administration: A Record of Progress*, accessed at <http://clinton4.nara.gov/WH/Accomplishments/asian.html>.

[26] *See* the White House, "President Clinton and Vice President Gore: Supporting Hispanic Americans," *The Clinton-Gore Administration: A Record of Progress*, accessed at <http://clinton3.nara.gov/WH/Accomplishments/HISPA00upd.html>

[27] The White House, "President Clinton and Vice President Gore: Supporting Native Americans," *The Clinton-Gore Administration: A Record of Progress*, accessed at <http://clinton4.nara.gov/WH/Accomplishments/native.html>.

[28] The White House, "President Clinton and Vice President Gore: Supporting Gay and Lesbian Americans," *The Clinton-Gore Administration: A Record of Progress*, accessed at <http://clinton4.nara.gov/WH/Accomplishments/ac399.html>.

[29] The White House, "President Clinton and Vice President Gore: Supporting Women and Families," *The Clinton-Gore Administration: A Record of Progress*, accessed at <http://clinton3.nara.gov/WH/Accomplishments/women.html>.

[30] Joan Biskupic, "Politics snares court hopes of minorities and women: Federal judges are more diverse, but minority nominees are still twice as likely to be rejected," *USA Today*, Aug. 22, 2000, p. 1A.

into Clinton's second term, the judiciary's composition has barely changed, thanks to an aggressive Republican strategy of thwarting Clinton's nominees—and a remarkable timidity on the President's part."[31] By August 2000, 35 percent of President Clinton's nominees for federal judges had been rejected or stood unconfirmed by the Senate.[32] Many of the difficulties President Clinton faced in appointing federal judges were beyond his control.

According to *USA Today*, even though President Clinton named more women and minorities to federal judge positions, "the numbers mask an appointment system that continues to favor white men significantly and is so dominated by politics and paybacks that minority nominees are twice as likely to be rejected as whites."[33] Further, since 1997, the conformation process has taken approximately three months longer for women and minorities than it has for white males. Some nominees have waited as long as four years to be confirmed by the Senate.[34] The Citizens' Commission on Civil Rights charged that:

> The most disturbing characteristic of the process of nominating and confirming judges to the federal bench in 1997–98 has undoubtedly been the prevalence of partisan politics over the need to fill judicial vacancies in a timely fashion with capable and qualified nominees. Conservatives have attempted to slap the label "judicial activist" both on nominees with whom they disagree on certain issues and on sitting judges whose opinions they dislike, often in civil rights cases.
>
> The potential end result of all of these efforts, whose proponents seek both to influence the decisions of sitting judges and to prevent the sitting president from filling more seats on the federal bench, is erosion of the principle of judicial independence and the consequent degradation of the quality of justice delivered to the citizens of America, including in civil rights cases.[35]

Despite the difficulties he faced, President Clinton has been widely praised by civil rights advocates and minority groups for his efforts to change the face of the judiciary.[36] Indeed, the Clinton administration even found ways around the political barriers. For example, on December 27, 2000, the President appointed Roger Gregory, an African American, to be the first black judge on the U.S. Court of Appeals for the Fourth Circuit. The one-year appointment, made during a congressional recess, allowed the President to avoid the Senate confirmation process temporarily.[37] This appointment was significant because Judge Gregory was the first African American in this circuit, which covers Maryland, Virginia, West Virginia, North Carolina, and South Carolina, and has the largest black population of all circuits. Nonetheless, Congress had blocked the President's previous African American nominees to this position, resulting in a vacancy for 10 years.[38]

Although President Carter had attempted to diversify the federal courts, both President Reagan and President Bush made appointments that did not reflect the diversity of the nation. President Bush, however, did nominate more female district court judges than any previous President except President Carter.[39] Comparatively, President Clinton appointed more female and minority judges to the lower federal courts than any of his predecessors.[40] In addition, individuals appointed by the Clinton administration were considered exceptionally well qualified by the American Bar Association.[41] Clinton's record

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[31] Ted Gest and Lewis Lord, "The GOP's judicial freeze: a fight to see who rules over the law," *U.S. News & World Report*, vol. 122, no. 20 (May 26, 1997), p. 23.

[32] Biskupic, "Politics snares court hopes of minorities and women," p. 1A.

[33] Ibid.

[34] Ibid.

[35] Mincberg and Hahn-Burkett, "Judicial Nominations and Confirmations During the First Half of the Second Clinton Administration," p. 63.

[36] Editorial, "Playing Politics with Judgeships," *Hartford Courant Company*, Aug. 28, 2000.

[37] Neil A. Lewis, "Clinton Names a Black Judge, Skirts Congress," *The New York Times*, Dec. 28, 2000; Dan Eggen, "Clinton Names Black Judge to Appeals Court, Recess Choice for Richmond Circuit is Challenge to GOP," *The Washington Post*, Dec. 28, 2000, p. A1.

[38] Lewis, "Clinton Names a Black Judge."

[39] *See* Shull, *American Civil Rights Policy From Truman to Clinton*, p. 141.

[40] Joan Biskupic, "Clinton Given Historic Opportunity to Transform Judiciary," *The Washington Post*, Nov. 19, 1996, p. A19.

[41] *See* Shull, *American Civil Rights Policy From Truman to Clinton*, p. 141. The American Bar Association Standing Committee on Federal Judiciary conducts evaluations of candidates for the federal judiciary that are referred to it by the Attorney General. The committee's evaluations are restricted to "the integrity, professional competence, and judicial temperament" of nominees. American Bar Association

of diversifying the court is so comprehensive that by the end of his term he came close to doubling the number of women and minorities who were appointed before he came to office.[42]

Federally Assisted and Conducted Programs

During his presidency, President Clinton issued several orders aimed at increasing the participation of women and minorities in federally assisted and conducted programs. In addition, several federal agencies, particularly the Department of Justice, made progress in issuing and clarifying policies and procedures related to civil rights.

President Clinton also made use of executive orders to effect policy, particularly with regard to the federal government. The executive orders he issued on civil rights-related issues demonstrated a strong commitment to the ideal of equal opportunity and the goal of making the federal work force a model employer from a diversity standpoint.[43] For these efforts, the Clinton record must be praised. According to an analysis by political scientist Steven Shull, both President Clinton and President Carter issued more executive orders on civil rights issues compared with other modern Presidents.[44]

Title VI and Title IX

Title VI of the Civil Rights Act of 1964[45] prohibits discrimination on the basis of race, color, or national origin in federally funded programs and activities. Similar to Title VI, Title IX of the Education Amendments of 1972[46] prohibits discrimination on the basis of sex in federally funded programs and activities. In January 1999, the Department of Justice issued policy guidance on the enforcement of Title VI and related statutes in block grant programs.[47] This guidance was in response to the Commission's recommendation in its 1996 report, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs.*[48] The guidance set forth guidelines for data collection, pre-award reviews, and other important aspects of administering block grant programs.[49]

On numerous occasions, the Commission recommended that federal departments and agencies with Title VI enforcement responsibilities, particularly premier Title VI enforcement agencies such as the Department of Education's Office for Civil Rights and the Department of Health and Human Services' Office for Civil Rights, revise their Title VI and Title IX regulations to reflect the changes effected by Congress in the Civil Rights Restoration Act of 1987, among other issues.[50] For more than 12 years, the agencies did not respond to the Commission's recommendations concerning the regulations.

However, a 1999 case involving a Title VI action against the National Collegiate Athletic Association (NCAA) highlighted the need for clarifying the regulations. In *Cureton v. NCAA*, the plaintiffs sued the NCAA, alleging that its academic regulations had a disparate impact on students of color, in violation of Title VI. The

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(ABA), *Standing Committee on Federal Judiciary: What It Is and How It Works*, 1999, p. 1. The committee has been consulted by every President since 1952 and by the U.S. Senate since 1948. Ibid., p. 2.

[42] Biskupic, "Clinton Given Historic Opportunity to Transform Judiciary," p. A19.

[43] *See* app. B for a list of civil rights-related executive orders issued by President Clinton.

[44] Shull, *American Civil Rights Policy From Truman to Clinton*, pp. 121–25.

[45] 42 U.S.C. § 2000d (1994).

[46] 20 U.S.C. §§ 1681–1688 (1994).

[47] Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Memorandum to Executive Agency Civil Rights Directors, re: Policy Guidance Document: Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs, Jan. 28, 1999 (hereafter cited as DOJ, Block Grant Guidance).

[48] USCCR, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, June 1996, pp. 149–55 (hereafter cited as USCCR, *Federal Title VI Enforcement*).

[49] *See* DOJ, Block Grant Guidance.

[50] *See, e.g.*, USCCR, *Federal Title VI Enforcement*. In that report, the Commission noted that the Civil Rights Restoration Act of 1987 (Pub L. No. 100-259, 102 Stat. 28 (codified as amended in scattered sections of U.S.C.)) was passed to reverse the effects of the Supreme Court case, *Grove City College v. Bell* (465 U.S. 555 (1984)), which held that the nondiscrimination provisions of Title IX applied only to the particular program receiving federal funds, not to the entire operations of the recipient institution. Because of the confusion over the scope of Title VI created by *Grove City* and the Civil Rights Restoration Act of 1987, the Commission recommended that the U.S. Department of Justice draft updated model regulations that include the definition of "programs and activities." USCCR, *Federal Title VI Enforcement*, p. 635. *See also* USCCR, *Equal Educational Opportunity Project Series*, vol. I , December 1996, pp. 254–357; USCCR, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality*, September 1999, p. 302.

Third Circuit rejected this argument, holding that the provisions of Title VI did not apply to the entire NCAA, but, rather, to an NCAA affiliate, the National Youth Sports Program Fund (the Fund), which operated out of NCAA member schools and received federal financial assistance. Because the NCAA and the Fund were two separate programs (although operating within the same institution), and the federal grants were not program specific to the NCAA, the court ruled that the NCAA's regulations did not violate Title VI.[51] The court observed that:

> [Title VI] as originally written, did not preclude recipients of Federal financial assistance from discriminating with respect to a program not receiving [federal financial] assistance. Thus, the language of Title VI is program specific as it relates to "participation in," "[denial of] the benefits of" or "discrimination under" "any program or activity receiving Federal financial assistance."[52]

The court observed that neither the Department of Education nor the Department of Health and Human Services had revised its Title VI regulations in conformity with the Civil Rights Restoration Act of 1987, which modified Title VI so that it encompassed programs or activities of a recipient of federal financial assistance on an institutionwide basis. The court stated:

> It is, of course, true that in response to the Supreme Court's program specific interpretation of Title IX in *Grove City*, Congress passed the Civil Rights Restoration Act of 1987 and thereby modified Title VI so that it encompasses programs or activities of a recipient of Federal financial assistance on an institution-wide basis. . . . Nevertheless, the Departments of Health and Human Services and Education have not modified *34 C.F.R. § 100.13* and *45 C.F.R. § 80.13* following enactment of the Restoration Act. Consequently, the regulations, which, unlike Title VI include disparate impact provisions, by their terms remain program specific. It therefore inexorably follows that, to the extent this action is predicated on the NCAA's receiving Federal financial assistance by reason of grants to the Fund, it must fail as the Fund's programs and activities are not in issue in this case.
>
> In reaching our result, we also point out the following. Neither Congress nor the Departments of Health and Human Services or Education has considered, at least in a formal proceeding of which we are aware, what the consequences would be if the disparate impact regulations were expanded beyond their current program specific limitations. It might well be that such expanded regulations could subject all aspects of an institution of higher education's activities to scrutiny for disparate discriminatory impact beyond anything Congress could have intended. Furthermore, the regulations have not been amended pursuant to the notice and comment provisions of the Administrative Procedure Act. Surely, such an expansion should not be made without the opportunity for comment by interested parties.[53]

As a result of this decision, the Department of Justice finally decided to change both the Title VI and Title IX regulations to clarify and broaden the definitions of the terms "programs" and "activities," consistent with Congress' express mandate in the Civil Rights Act of 1987. In August 2000, a common rule was issued, covering several agencies, which provided for the enforcement of Title IX of the Education Amendments of 1972.[54] Title IX prohibits discrimination on the basis of sex in educational programs or activities by recipients of federal financial assistance. The statute was modeled after Title VI, which prohibits discrimination on the basis of race, color, and national origin in all programs or activities receiving federal financial assistance. According to the new regulations:

> The goal of Title IX is to ensure that Federal funds are not utilized for and do not support sex-based discrimination, and that individuals have equal opportunities, without regard to sex, to pursue, engage or participate in, and benefit from academic, extracurricular, research, occupational training, employment, or other educational programs or activities. For example (and without limitation), subject to exceptions described in these Title IX regulations, Title IX prohibits a recipient from discriminating on the basis of sex in: student admissions, scholarship awards and tuition assistance, recruitment of students and employees, the provision of courses and other academic offerings, the provision of and participation in athletics and extracurricular activities, and all aspects of employment, including, but not limited to, selection, hiring, compensation, benefits, job assignments and classification, promotions, demotions, tenure, train-

[51] Cureton v. NCAA, 198 F.3d 107 (3d Cir. Pa. 1999).

[52] *Id.* at 114–15, citing Grove City College v. Bell, 465 U.S. at 570–71 (Title IX); Bd. of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969) (Title VI).

[53] Cureton v. NCAA, 198 F.3d at 115–16.

[54] "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Part III," 65 Fed. Reg. 52858 (Aug. 30, 2000).

ing, transfers, leave, layoffs, and termination. . . . Of course, Title IX prohibits discrimination on the basis of sex in the operation of, and the provision or denial of benefits by, education programs conducted by noneducational institutions, including, but not limited to, prisons, museums, job training institutes, and for profit and nonprofit organizations.[55]

The new regulations also provide specific examples of the types of programs to which Title IX applies:

[F]or example, these Title IX regulations will apply to such diverse activities as a forestry workshop run by a state park receiving funds from the Department of Interior; a boater education program sponsored by a county parks and recreation department receiving funding from the Coast Guard; a local course concerning how to start a small business, sponsored by the state department of labor that receives funding from the Small Business Administration; and state and local courses funded by the Federal Emergency Management Agency in planning how to deal with disasters. Vocational training for inmates in prisons receiving assistance from the Department of Justice is also covered by these Title IX regulations. In short, these Title IX regulations apply to the educational programs or activities of any entity receiving financial assistance from the participating agencies.[56]

These regulations had not been updated since their original issuance in 1975. The revised regulations reflect a concern for ensuring consistent and careful implementation of federal civil rights law that is a credit to the Clinton administration's federal civil rights enforcement record.

The Commission recognizes the Clinton administration's efforts to clarify the Title IX and Title VI regulations to differentiate between federally assisted *program* and *activity*. Unfortunately, this action was not taken until recently, and seemingly only after a court decision forced the government to take action to clarify its regulations. Further, in many instances, Clinton administration civil rights enforcement agencies did not effectively respond to claims of Title VI violations.[57]

Federally Conducted Education and Training Programs

Elsewhere, the Clinton administration has sought to extend civil rights protections within federally conducted programs. On June 23, 2000, President Clinton issued Executive Order 13160, "Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs."[58] With this order the President stated:

The Federal Government must hold itself to at least the same principles of nondiscrimination in educational opportunities as it applies to the education programs and activities of State and local governments, and to private institutions receiving Federal financial assistance. . . . Through this Executive Order, discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent will be prohibited in Federally conducted education and training programs and activities.[59]

The order directs the Department of Justice to publish rules, regulations, policies, or guidance concerning this order and provides a process for filing and investigating complaints of noncompliance with this order.[60]

Persons with Limited English Proficiency

Another positive element of President Clinton's civil rights efforts relating to federally assisted and conducted programs was his focus on further clarifying and refining protections for specific classifications, such as national origin discrimination against persons with limited English proficiency (LEP). On August 11, 2000, President Clinton issued Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency."[61] In a statement accompanying the signing of the order, the President stated:

I am concerned that language barriers are preventing the federal government and recipients of federal financial assistance from effectively serving a large number of people in this country who are eligible to participate in their programs. Failure to systemati-

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[55] *Id.*

[56] *Id.*

[57] For example, the Clinton administration took little action to address challenges to affirmative action such as California's Proposition 209 or the decision in *Hopwood v. Texas*. *See* pp. 67–70.

[58] Exec. Order No. 13,160, 65 Fed. Reg. 39775 (June 23, 2000).

[59] *Id.* at § 1-101.

[60] *Id.* at §§ 4–5.

[61] Exec. Order No. 13,166, 65 Fed. Reg. 50121 (Aug. 11, 2000).

cally confront language barriers can lead to unequal access to federal benefits based on national origin and can harm the mission of federal agencies. Breaking down these barriers will allow individuals with limited English proficiency to more fully participate in American society.[62]

The executive order directs every federal agency to develop a plan to improve access to its programs and activities, both federally assisted and conducted, for persons with limited English proficiency. Each agency is required to draft Title VI guidance specifically tailored to its recipients, consistent with the Department of Justice (DOJ) LEP guidance.[63]

The DOJ LEP guidance was issued on August 16, 2000. The guidance notes that "[a] federal aid recipient's failure to assure that people who are not proficient in English can effectively participate in and benefit from programs and activities may constitute national origin discrimination prohibited by Title VI."[64] According to the guidance, what constitutes reasonable steps in ensuring meaningful access to LEP persons depends on several factors, including the number or proportion of LEP individuals served by the program, the frequency of contact between the program and LEP individuals, the nature and importance of the program, and the resources available from the program to assist LEP individuals.[65]

The Department of Health and Human Services was the first agency to issue policy guidance in accordance with the DOJ guidance and the executive order. The HHS guidance, issued August 30, 2000, clarifies the requirement to ensure that eligible LEP persons have meaningful access to programs and services, and provides examples of policies or practices that would violate Title VI.[66] The President specifically commended HHS for issuing this policy guidance.[67]

Asian Americans and Pacific Islanders Initiative

Similarly, the President has focused on access to federal programs and activities, as well as federal employment, for specific racial and ethnic minority groups. In June 1999, the President issued Executive Order 13125, "Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs."[68] The executive order established a President's Advisory Commission on Asian Americans and Pacific Islanders within HHS and created an interagency working group on Asian Americans and Pacific Islanders. The President's Advisory Commission is responsible for advising the President on:

> (a) the development, monitoring, and coordination of Federal efforts to improve the quality of life of Asian Americans and Pacific Islanders through increased participation in Federal programs where such persons may be underserved and the collection of data related to Asian American and Pacific Islander populations and sub-populations; (b) ways to increase public-sector, private-sector, and community involvement in improving the health and well-being of Asian Americans and Pacific Islanders; and (c) ways to foster research and data on Asian Americans and Pacific Islanders, including research and data on public health.[69]

The order also requires each executive department, and agencies designated by the Secretary of HHS, to prepare a plan to improve the quality of life of Asian Americans and Pacific Islanders through increased participation in federal programs. These plans will be integrated into a governmentwide plan.[70]

In January 2001, the President's Advisory Commission released its interim report to the President and the nation titled *Asian Americans and Pacific Islanders, A People Looking For-*

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[62] The White House, Office of the Press Secretary, "Statement by the President [re: the signing of Executive Order 13166]," Aug. 11, 2000, accessed at <http://clinton6.nara.gov/2000/08/2000-08-11-executive-order-13166-on-limited-english-proficiency-services.html>.

[63] Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50121, 50122 (Aug. 16, 2000).

[64] Enforcement of Title VI of the Civil Rights of 1964—National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50123 (Aug. 16, 2000).

[65] *Id.*

[66] DOJ, LEP Guidance, 65 Fed. Reg. 52762 (2000).

[67] The White House, Office of the Press Secretary, "Statement by the President [re: the HHS LEP policy guidance]," Aug. 30, 2000, accessed at <http://clinton6.nara.gov/2000/08/2000-08-30-statement-by-the-president-on-lep.html>. This guidance also satisfies several recommendations the Commission made in 1999 concerning HHS regulations. USCCR, *The Health Care Challenge*, vol. II, pp. 308–11.

[68] Exec. Order No. 13,125, 3 C.F.R. 193 (2000).

[69] *Id.* at § 2.

[70] *Id.* at §§ 4–5.

ward, Action for Access and Partnership in the 21st Century.[71] The commission made recommendations in the following five areas:

- Improve data collection, analysis, and dissemination for Asian Americans and Pacific Islanders by fully implementing the 1997 Office of Management and Budget Standards for Maintaining, Collecting and Presenting Federal Data on Race and Ethnicity. This policy requires all federal agencies to collect and report data by race and ethnicity by January 1, 2003. Further, all data about Asian Americans and Pacific Islanders should be disaggregated for research, planning, funding, and program implementation. The commission encouraged continued development of sampling, analytical, and other methods to improve data collection, including working in partnership with Asian American and Pacific Islander communities to promote community-based researchers and research methodologies. These steps are necessary to ensure that federal programs and services are implemented in the most responsive and effective manner to the needs of the community.
- Ensure access, especially linguistic access and cultural competence, for Asian Americans and Pacific Islanders by implementing the Limited English Proficiency Executive Order, issued by President Clinton, which directs all federal agencies to devise a plan to improve the language accessibility of their programs. The quality of translation and interpretation services should be standardized and evaluated and provided by professionals with appropriate compensation. Similarly, programs that involve English as a second language instruction and civics education should be expanded so immigrants can become full participants in our society. The commission encouraged the continued development and application of cultural competence standards in all federal programs and services, including requirements for funding. It recommended that Asian and Pacific Islander cultures and histories be integrated in educational curricula and publicly funded arts and cultural programs.
- Protect civil rights and equal opportunity for Asian Americans and Pacific Islanders by vigorously enforcing labor laws, supporting federal efforts to fight against crime and domestic violence, and making environmental justice a top priority. Immigration laws must be fair and more efficient and the impact of welfare reform on Asian American and Pacific Islander families should be analyzed. Further, the commission supported efforts by Filipino World War II veterans seeking full and equitable benefits. Barriers to increased civil participation by Asian American and Pacific Islanders need to be addressed.
- Recognize and include Native Hawaiians and Pacific Islanders in federal programs and services.[72]

Similar to the executive orders issued by President Clinton in the last rather than the first two years of his presidency, the value of the Asian Americans and Pacific Islanders Initiative was diminished by its timing. It is, therefore, unclear how effective this program will be. Nonetheless, as with other initiatives, the Commission commends the Clinton administration for taking steps to address protected classifications and expand opportunities for minorities. Although the Asian Americans and Pacific Islanders Initiative, the Limited English Proficiency Initiative, and other programs were developed near the close of the Clinton administration, they nonetheless provide a foundation upon which future administrations can build.

Equal Opportunity in Federal Employment

"If more federal employees were financially able to bear the cost of litigation, there would be a tidal wave of Title VI lawsuits filed in federal court. The government, with unlimited litigation capabilities, seeks, with the collusion of the courts, to drag out cases, sometimes for 15 to 20 years, to bankrupt plaintiffs who are ordinary citizens or who do not have the bene-

[71] The White House Initiative on Asian Americans and Pacific Islanders, *A People Looking Forward, Action for Access and Partnerships in the 21st Century*, Interim Report to the President, Jan. 17, 2001, accessed at <http://www.aapi.gov.intreport.htm>.

[72] Ibid. *See* section on Federal Protection for Indigenous Rights for further details of the commissioners' recommendations.

fit of pro bono class action legal counsel. This prospect is a significant deterrent to filing lawsuits."[73]

—Gerald R. Reed, president, Blacks in Government

Currently, 46.5 percent of all federal employees are women and minorities account for about 30 percent of federal workers.[74] In addition, 7.2 percent of the federal work force is composed of workers with disabilities; severely disabled people represent 1.2 percent of the work force.[75] Since 1986, the percentage of minorities in grades GS-1 through GS-5 have decreased, while the percentage of minorities in higher grades, particularly those above GS-12, have increased dramatically.[76] In 1999, minorities accounted for 38 percent of the employees occupying grades GS-5 through GS-8, and 36 percent of employees in grades GS-9 through GS-12. Minorities also occupied 14.2 percent of GS-13, GS-14, and GS-15 positions.[77]

However, there have been many allegations of unfairness and discrimination in federal employment, including allegations involving promotions and dismissals. In 1994, in response to allegations of discrimination in federal employment, President Clinton requested a study on racial and ethnic disparities in firings.[78] His request was prompted by an Office of Personnel Management review of 1992 statistics indicating that three times more minority employees than white employees were fired from the federal government.[79] The resulting report verified that, even after taking into account factors such as education, occupation, and performance ratings, African Americans and Native Americans were more likely to be fired than other persons. Asian Americans and Pacific Islanders and Hispanics were not fired at a significantly different rate from that of non-Hispanic whites.[80] Notably, 1999 discharge data show that minority firings continue to be three times that of nonminority firings.[81]

Building on the directives of his predecessors, President Clinton both expanded civil rights protections to include new classifications and further clarified requirements for ensuring equal employment opportunity within the federal work force. He did so, in part, by amending Executive Order 11478, issued in 1969 by President Richard M. Nixon.[82] This executive order was designed to ensure nondiscrimination in federal employment through affirmative means. During his administration, President Clinton reinvigorated Executive Order 11478 in a variety of ways that seem to reflect the year 2000 rather than 1969. Between 1997 and 2000, several policies were put into effect addressing discrimination in federal employment. These policies covered the following:

- *Religious Freedom.* On August 14, 1997, the White House issued guidelines on religious freedom in the federal workplace.[83] The guidelines provide examples of acceptable employee practices and clarified the prohibitions against discrimination in federal employment on the basis of religion, religious beliefs, or views concerning religion.[84]
- *Sexual Orientation.* In 1998, President Clinton issued Executive Order 13087, an amendment to Executive Order 11478, which prohibits discrimination based on sexual orientation in the federal government.[85]

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[73] Gerald R. Reed, president and CEO, Blacks in Government, Testimony before the House of Representatives Committee on Government Reform, Subcommittee on Civil Service, Mar. 29, 2000, p. 3 (hereafter cited as Reed testimony).

[74] U.S. Office of Personnel Management (OPM), *The Fact Book 2000 Edition: Federal Civilian Workforce Statistics*, OWI-00-05, October 2000, p. 48.

[75] Ibid., p. 42.

[76] Ibid., p. 38.

[77] Ibid. The federal government pay scale, or general schedule (GS), ranges from grade 1 (GS-1) to grade 15 (GS-15), with 15 being the highest grade.

[78] Stephen Barr, "Governing Probing Disparity in Firings; Inquiry to Address Concerns About Whether Minority Federal Workers Are Treated Fairly," *The Washington Post*, Feb. 6, 1994, p. A11.

[79] Ibid.

[80] Hilary Silver, "Firing Federal Employees: Does Race Make A Difference," app. D in OPM, *Final Report: Minority/Non-Minority Disparate Discharge Rates*, April 1995, p. D-1.

[81] OPM, "Discharge Rages by Minority Group Status," provided via facsimile.

[82] Exec. Order No. 11,478, Aug. 8, 1969, § 1 (set forth as a note under 42 U.S.C. § 2000e (1994)).

[83] The White House, Office of the Press Secretary, "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace," Aug. 14, 1997.

[84] Ibid.

[85] Exec. Order No. 13,087, 3 C.F.R. 191 (1999). In a statement concerning the order, President Clinton stated: "It has always been the practice of this administration to prohibit discrimination in employment based on sexual orientation in the civilian workforce, and most Federal agencies and departments have taken actions, such as the issuance of policy

- *Parental Status.* As he had with Executive Order 13087, President Clinton issued Executive Order 13152 to expand the protected classifications for nondiscrimination in federal employment. Executive Order 13152 adds the category of "status as a parent" to the nondiscrimination provisions of Executive Order 11478.[86]
- *Genetic Information.* In February 2000, Executive Order 13145, "To Prohibit Discrimination in Federal Employment Based on Genetic Information," was issued by President Clinton.[87] The order provides for "equal employment opportunity in federal employment for all qualified persons" and prohibits "discrimination against employees based on protected genetic information, or information about a request for or the receipt of genetic services."[88]
- *Individuals with Disabilities.* On the 10th anniversary of the signing of the Americans with Disabilities Act of 1990, President Clinton signed two executive orders pertaining to individuals with disabilities. The first, Executive Order 13163, was aimed at increasing the opportunity for individuals with disabilities to be employed in the federal government.[89] With this order, the President pledged that the federal government would hire 100,000 individuals with disabilities over the next five years.[90] In tandem with Executive Order 13163, the President issued Executive Order 13164, "Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation," which directs each federal agency to develop written procedures for responding to requests for reasonable accommodation from employees and applicants with disabilities.[91]
- *Hispanic Employment.* On October 12, 2000, President Clinton signed Executive Order 13171, "Hispanic Employment in the Federal Government."[92] With this executive order, the President announced a goal to improve the representation of Hispanics in federal employment. Noting that Hispanics remain underrepresented in the federal work force (Hispanics currently account for only 6.4 percent of the federal civilian work force), the executive order requires each department and agency to "establish and maintain a program for the recruitment and career development of Hispanics in Federal employment."[93]

The Commission commends the Clinton administration for (1) extending protection from discrimination within the federal work force on the basis of sexual orientation, parental status, and genetic information; and (2) taking steps to ensure other protected groups are fairly represented in the federal government. However, more attention must be paid to ensuring nondiscrimination in federal employment and improving the mechanisms for reporting and investigating discrimination.

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directives or memoranda from the agency heads, to memorialize that policy. The Executive order I have signed today will ensure that there is a uniform policy throughout the Federal Government by adding sexual orientation to the list of categories for which discrimination is prohibited in Executive Order 11478 (i.e., race, color, religion, sex, national origin, handicap, or age)." William J. Clinton, "Statement on Signing an Executive Order on Equal Employment Opportunity in the Federal Government," 34 WEEKLY COMP. PRES. DOC. 994 (May 28, 1998).

[86] Exec. Order No. 13,152, 65 Fed. Reg. 26115 (May 2, 2000).

[87] Exec. Order No. 13,145, 65 Fed. Reg. 6877 (Feb. 8, 2000).

[88] *Id.* at § 1-101. The order directs the EEOC to coordinate this policy. *Id.* at § 1-103. In response, EEOC issued policy guidance and a fact sheet on the executive order in July 2000. U.S. Equal Employment Opportunity Commission (EEOC), "EEOC Policy Guidance on Executive Order 13145: To Prohibit Discrimination in Federal Employment Based on Genetic Information," EEOC Notice No. 915.002, July 26, 2000; EEOC, "Questions and Answers: EEOC Policy Guidance on Executive Order 13145 Prohibiting Discrimination in Federal Employment Based on Genetic Information," July 27, 2000, accessed at <http://www.eeoc.gov/docs/qanda-genetif.html>.

[89] Exec. Order No. 13,163, 65 Fed. Reg. 46563 (July 26, 2000).

[90] *Id.* at § 1(b)–(c).

[91] Exec. Order No. 13,164, 65 Fed. Reg. 46565 (July 26, 2000). EEOC issued policy guidance on how to establish such procedures in October 2000. U.S. Equal Employment Opportunity Commission, "EEOC Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation," directives transmittal no. 915.002, Oct. 20, 2000. In addition to the two executive orders, President Clinton also issued a memorandum to the heads of executive departments and agencies on ensuring that federal programs are free from disability-related discrimination. William J. Clinton, Memorandum for the Heads of Executive Departments and Agencies, re: Renewing the Commitment to Ensure that Federal Programs are Free from Disability-Based Discrimination, July 26, 2000, accessed at <http://clinton6.nara.gov>.

[92] Exec. Order. No. 13,171, 65 Fed. Reg. 61251 (Oct. 12, 2000).

[93] *Id.*

According to Blacks in Government, an organization of federal, state, and local government employees, "the extent and intensity of racial discrimination in federal employment is obscured by the nature of the complaint procedure and by the cost of litigation, which is a major deterrent to would-be complainants."[94] The organization also charges that "nefarious" techniques are used to eliminate discrimination complaints and the handling of complaints by the Equal Employment Opportunity Commission (EEOC) is so poor that it is "impossible to determine the full extent of employment discrimination in the government."[95] The ultimate result of discrimination in federal employment, according to Blacks in Government, is the loss of federal funds paid out in costly litigation. Therefore, the organization believes Title VII violations by the federal government should be treated as criminal offenses with the offenders paying fines or going to jail.[96]

Congressman Albert R. Wynn also has called attention to this issue. At a 1999 Blacks in Government press conference, the congressman stated, "[T]he problem of federal workforce discrimination [has] been a long-festering sore. We looked at patterns of abuse and manipulation of personnel rules in several government agencies and determined that this problem is systemic."[97] Congressman Wynn has called for hearings to address the issue and also has recommended that the complaint process be revamped so that it can effectively address the issue of discrimination in the federal work force.[98] This issue needs more examination, and the next President must study it to determine what can be done to resolve the problems that exist.

Funding for Civil Rights Agencies

"I propose the largest-ever investment in our civil rights laws for enforcement, because no American should be subjected to discrimination in finding a home, getting a job, going to school or securing a loan. Protections in law should be protections in fact."[99]

—President Clinton, State of the Union Address, January 27, 2000

The Clinton administration stated that it increased the federal budget for civil rights enforcement.[100] For the most part, budgets requested for fiscal year (FY) 2001 were higher than the requests for FY 1994, the first federal budget affecting the Clinton administration (see figure 2-1). However, although the President requested increases in the budgets of civil rights agencies, Congress did not always appropriate funds in accordance with his requests. Further, in many cases, the increases requested were not large enough to keep pace with burgeoning workloads and a history of limited funding.

The budgets of civil rights agencies did not fare well between FY 1996 and FY 1998 (see figure 3-1). The workloads of all civil rights enforcement agencies increased during the 1990s, particularly because of increased responsibilities with regard to the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, and the implementation of President Clinton's executive orders regarding federally assisted and conducted programs.[101]

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[94] Reed testimony, p. 3.

[95] Ibid.

[96] Ibid., p. 1.

[97] Albert R. Wynn, statement, Blacks in Government press conference, June 29, 1999.

[98] Ibid.

[99] William J. Clinton, State of the Union Address, Jan. 27, 2000, accessed at <http://clinton4.nara.gov/textonly/WH/SOTV00/book>.

[100] The White House, *Clinton-Gore Administration: A Record of Progress.*

[101] *See generally* USCCR, *Funding Federal Civil Rights Enforcement: 2000 and Beyond*, February 2001.

FIGURE 3-1

Civil Rights Funding, 1994–2001 (actual dollars)

Figure 3-1a
DOEd/OCR Funding History

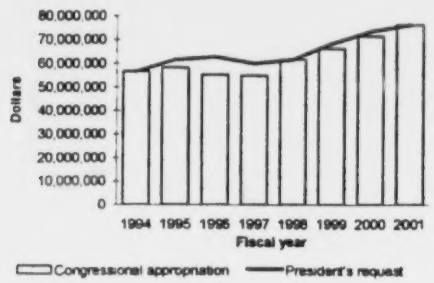


Figure 3-1b
EEOC Funding History

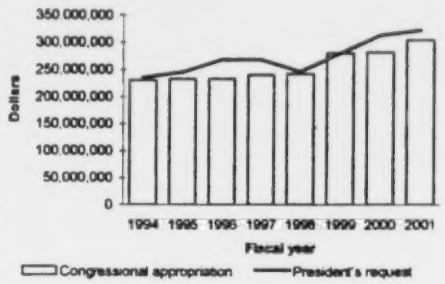


Figure 3-1c
DOJ/CRD Funding History

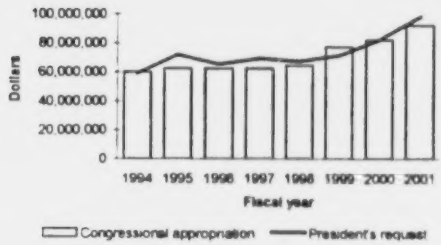


Figure 3-1d
HUD/FHEO Funding History

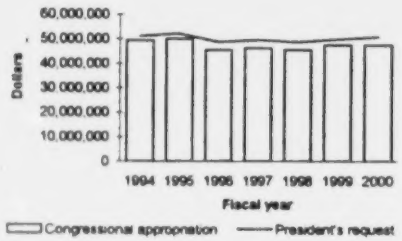


Figure 3-1e
HHS Funding History

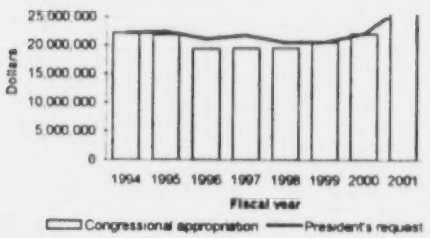


Figure 3-1f
DOL/OFCCP Funding History

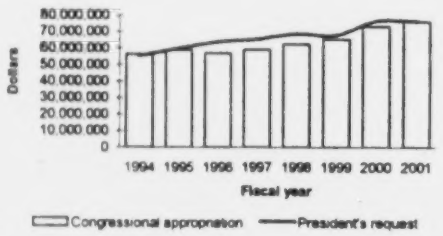
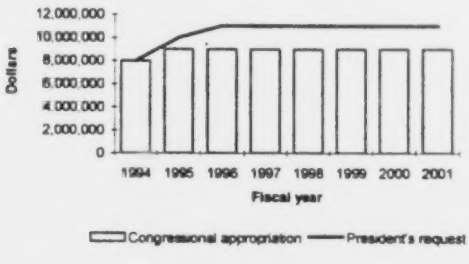


Figure 3-1g
USCCR Funding History



Sources for figures 3-1a–3-1f: U.S. Commission on Civil Rights, *Funding Civil Rights Enforcement: 2000 and Beyond*, October 2000. Source for figure 3-1g: U.S. Commission on Civil Rights, Budget and Finance Division. Note that data presented in figure 3-1d are estimates based on historical data. Such estimates are not available for FY 2001.

Some civil rights agencies have not recovered from the effects of budget cuts between FY 1996 and FY 1998. For example, in FY 2000, the Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity and the Department of Health and Human Services' Office for Civil Rights received appropriations that were below their FY 1994 appropriations. Other civil rights agencies also suffered difficulties during FY 1996 and FY 1997, but increases in appropriations during FY 1999 and FY 2000 have brought their budgets above the spending power of FY 1994 appropriations. Nonetheless, during the Clinton administration, overall, presidential budget requests and congressional appropriations for federal agencies did not keep up with inflation, nor have they kept up with increases in workload and responsibilities.[102]

Civil rights appropriations for FY 2001, for the most part, were commensurate with President Clinton's requests. The appropriations for the Department of Education's Office for Civil Rights and the Office of Federal Contract Compliance Programs both matched the President's request. Only the Department of Justice's Civil Rights Division (CRD) and the EEOC received lower amounts than were requested.[103] President Clinton requested $98 million and $322 million for CRD and EEOC, respectively. Congress appropriated $92 million for CRD and $304 million for EEOC.[104]

Although President Clinton, for the most part, sought to increase funding for federal agencies, in some cases the requested funds remained below what is necessary to properly enforce civil rights laws, particularly when inflation is taken into consideration. This neglect of civil rights agencies in the President's budget suggests that, overall, civil rights enforcement may not have been a high enough priority for the Clinton administration, despite the President's pronouncements to the contrary.

In addition, the reluctance of Congress to meet presidential requests, while a situation over which he had no control, further eroded the ability of federal civil rights agencies to combat discrimination. The importance of these agencies cannot be overstated. These agencies work not only to protect the rights of all Americans, but, in the long run, save taxpayer money by assertively educating the public and correcting problems before they become costly.[105]

Discrimination on the Basis of Sex and Sexual Orientation in the Military

In the 1990s, the U.S. military, perhaps because of its unique status as an institution, continued to present special civil rights-related challenges. Two of the most prominent issues involving the military during the 1990s were discrimination on the basis of sex, particularly sexual harassment, and discrimination on the basis of sexual orientation. The ways in which the Clinton administration sought to address these problems reflect its willingness to tackle controversial issues with innovative ideas. Unfortunately, ultimately, the policies developed were ineffective or insufficiently enforced.

Discrimination on the Basis of Sexual Orientation

One of President Clinton's early promises was to address the issue of gays and lesbians in the military.[106] In 1993, in one of the first major political battles of his administration, the President fought hard to end the military's ban on gay and lesbian service members. Clinton met with strong opposition from many in Congress and the Joint Chiefs of Staff. In the end, he settled for a compromise solution, the "Don't Ask, Don't Tell" policy.[107] According to the President, this policy provided "a sensible balance between the rights of the individuals and the needs of our military to remain the world's number one fight-

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[102] *See generally* ibid.

[103] Executive Office of the President of the United States, Office of Management and Budget, information provided via facsimile, Dec. 21, 2000.

[104] Ibid.

[105] For example, if the USDA Office of Civil Rights had not been closed in 1983, the department may not have been involved in two multimillion dollar lawsuits in which it was accused of discriminating against minority farmers. *See* pp. 39–41 below.

[106] *See* Kenneth T. Walsh, "Why Clinton fights for gays," *U.S. News & World Report*, vol. 114, no. 5 (Feb. 8, 1993), p. 33; Richard D. Mohr, "Military Disservice, President Bill Clinton's Policy on Homosexuals in the Military," *Reason*, vol. 25, no. 4 (August 1993), p. 42.

[107] Les Aspin, Secretary of Defense, Memorandum for the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chairmen, Joint Chiefs of Staff, re: Policy on Homosexual Conduct in the Armed Forces, July 19, 1993, accessed at <http://www.chinfo.navy.mil/navpalib/people/homosexu/aspi0719.txt>.

ing force."[108] The "Don't Ask, Don't Tell" policy requires that the military end investigations designed to determine the sexual orientation of service members. However, the policy allows for such investigations under certain circumstances. The military instituted the policy on February 28, 1994, after many months of controversy, extensive hearings in Congress, and the enactment of a federal statute.[109] As required under the act, engaging in homosexual conduct remains grounds for discharge from the military. Congress expressly found that service by those "who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."[110] The longstanding prohibition of homosexual conduct therefore was found to be "necessary in the unique circumstances of military service."[111]

However, the Department of Defense (DOD) recognized that sexual orientation is a personal and private matter that is not a bar to military service unless manifested by homosexual conduct.[112] Therefore, under the new law applicants for military service may no longer be asked about sexual orientation. Moreover, the services may not initiate investigations solely to determine a member's sexual orientation. Commanders may initiate an investigation only upon receipt of credible information that a service member has engaged in homosexual conduct, i.e., stated his or her homosexuality, committed a homosexual act, or entered into a homosexual marriage.[113]

The policy has been challenged in court, alleging that it violates the First Amendment rights of homosexual service members. However, different courts have reached different conclusions concerning the constitutionality of the policy in the First Amendment context.[114] In addition, in 1999 the President was quoted as saying that the policy was "out of whack" and was not being carried out as he intended.[115] Beyond the policy itself, the implementation of it has been poor. Further, no specific guidance on implementing and enforcing the requirements of the policy have ever been issued, and no attempt has been made to clarify key terms.[116]

In March 2000, DOD's inspector general released a report on the military environment with respect to the homosexual conduct policy. Some of the findings of the inspector general's report were:

- derogatory remarks about homosexuals are commonplace and tolerated to some extent;
- offensive speech is the most common form of harassment, although 5 percent of the respondents had witnessed harassment in the form of vandalism, physical assaults, and limitation or denial of training or career opportunities;

[108] The White House, Office of the Press Secretary, Remarks by the President at National Defense University, July 19, 1993, accessed at <http://www.chinfo.navy.mil/navpalib/people/homosexu/clin0719.txt>.

[109] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, Div. A, Title V, Subtitle G, § 571(a)(1), 107 Stat. 1670 (codified at 10 U.S.C. § 654 (1994)).

[110] 10 U.S.C. § 654(a)(15).

[111] *Id.* at § 654(a)(13).

[112] U.S. Department of Defense (DOD), Office of the Under Secretary of Defense (Personnel and Readiness), *Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military*, Report of the Secretary of Defense, April 1998, accessed at <http://www.defenselink.mil:80/pubs/rpt040798.html> (hereafter cited as DOD, *Review of Policy on Homosexual Conduct*).

[113] Ibid.

[114] *See* Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995) (finding the policy violative of the First Amendment). *See* Able v. U.S. 88 F.3d 1280 (2d Cir. 1996) (vacating and remanding to Eastern District on technical grounds; the court did not reach merits); Able v. U.S., 968 F. Supp. 850 (E.D.N.Y. 1997) (on remand, injunction granted, finding constitutional violation); Able v. U.S., 155 F.3d 628 (2d Cir. 1998) (reversing, policy passes Constitutional muster). *See also* Thorne v. United States Dep't of Defense, 916 F. Supp. 1358, 1372 (E.D. Va. 1996) (finding that the plan would be violative of the First Amendment if "it is implemented in practice in such as way as to make the presumption irrebutable"). *But see* Richenberg v. Perry, 909 F. Supp. 1303 (D. Neb. 1995) and Selland v. Perry, 905 F. Supp. 260 (D. Md. 1995) (upholding the policy against First Amendment challenge).

[115] Robert Pear, "President Admits 'Don't Ask' Policy Has Been Failure," *The New York Times*, Dec. 12, 1999, p. A1.

[116] For example, there has been no guidance issued on the term "credible information." This term reflects a crucial aspect of the policy: the exclusions to the rule forbidding investigation into sexual orientation. Guidance is needed on what standards are used to ensure that information obtained is based on specific knowledge of the circumstances and a disinterested relation to the matter in question. *See* DOD, *Review of Policy on Homosexual Conduct*.

- less than 50 percent of the respondents had received training on the military's homosexual policy; and
- while 50 percent believed the policy to be moderately or very effective, 46 percent believed it was slightly effective or not effective.[117]

Due in part to the 1998 inspector general's report, in July 2000 DOD announced its plan to enhance the "Don't Ask, Don't Tell" policy by requiring training and by holding commanders personally responsible for enforcement of the policy.[118]

The Commission applauds the Clinton administration for addressing such a controversial issue and for acknowledging the problem of discrimination on the basis of sexual orientation. However, the policy developed by the administration did not satisfactorily address the issue and has been poorly implemented, resulting in little or no improvement in conditions for gay men and lesbians in the military.

Sexual Harassment

In 1995, the Department of Defense issued the results of its study on sexual harassment in the military.[119] The study found that, overall, reports of sexual harassment had declined significantly since 1988. However, 19 percent of all respondents (55 percent of women and 14 percent of men) reported that one or more incidents of sexual harassment had occurred at work in the year prior to the survey.[120] Nonetheless, incidents of sexual harassment continued to receive national attention.

After an incident of alleged sexual misconduct at the Army's Aberdeen Proving Ground in Maryland in 1996, the Secretary of the Army issued the following statement:

> The Army will not tolerate sexual harassment. It degrades mission readiness by devastating our ability to work effectively as a team and is incompatible with our traditional values of professionalism, equal opportunity, and respect for human dignity, to which every soldier must adhere.[121]

At that time, the Secretary of the Army established a panel to conduct a comprehensive review of the Army's sexual harassment policies and directed the Army's inspector general to review the sexual harassment policies and procedures of training organizations and units.[122] Other segments of the nation's armed forces have also initiated policies and programs aimed at combating sexual harassment.[123] Despite these efforts, however, allegations of sexual harassment in the military persist,[124] and therefore continue to be a serious civil rights issue for the 21st century.

Environmental Justice

"Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no groups of people, including a

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[117] U.S. Department of Defense, Office of the Inspector General, *Military Environment with Respect to the Homosexual Conduct Policy*, report no. D-2000-101 (Mar. 16, 2000), p. 18.

[118] Thomas E. Ricks, "Pentagon Vows to Enforce 'Don't Ask,' Training Program is Planned to Ease Harassment of Gays," *The Washington Post*, July 22, 2000, p. A1; "Military to Stress Gay Bias is Forbidden," *Newsday*, July 22, 2000, p. A12.

[119] U.S. Department of Defense, *1995 Sexual Harassment Study*, accessed at <http://www.defenselink.mil:80/news/fact_sheets/sxhas95.html>.

[120] Ibid. These results were found to replicate a 1988 survey on sexual harassment. DOD also administered a new survey form with greatly expanded categories for reporting sexual harassment, including incidents occurring off duty and off base. With this second form, the study found that 43 percent of active-duty military persons (78 percent of female respondents and 38 percent of male respondents) had experienced one or more forms of sexual harassment in the year prior to the survey. Ibid.

[121] Togo D. West, Jr., Secretary of the Army, Memorandum for Major General Richard S. Siegfried, re: the Secretary of the Army's Senior Review Panel on Sexual Harassment, Nov. 21, 1996, accessed at <http://www.dtic.mil/armylink/news/Nov1996/r19961122news-rls.html>.

[122] U.S. Army, Public Affairs, "Army Announces Sexual Harassment Panel and Inspector General Review," news release no. 96-82, Nov. 22, 1996, accessed at <http://www.dtic.mil/armylink/news/Nov1996/r19961122news-rls.html>.

[123] *See, e.g.*, U.S. Navy, "Navy actions and initiatives combating sexual harassment," accessed at <http://www.chinfo.navy.mil/navpalib/harasmnt/sharass1.html>.

[124] *See, e.g.*, Elizabeth Becker, "Women in Military Say Silence on Harassment Protects Careers," *The New York Times*, May 12, 2000, p. A1; Thomas E. Ricks, "General's Case Raises Worries on Harassment, Military Women See No Safety in Rank," *The Washington Post*, Apr. 5, 2000, p. A1; Steve Vogel, "Harassment Claim Targets a Quantico Boss, Male Officer's Complaint Ends in Woman's Censure," *The Washington Post*, Feb. 20, 2000, p. C1.

racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies."[125]

—U.S. Environmental Protection Agency

In 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."[126] With this order the President directed each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[127] The order also created the Interagency Working Group on Environmental Justice to assist agencies in developing strategies to ensure environmental justice.[128]

The Environmental Protection Agency (EPA) took the lead in responding to this mandate. In 1995, EPA issued its Environmental Justice Strategy.[129] In addition, in February 1998, EPA issued its "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits."[130] Since then, the agency has held several "public listening sessions" on the draft guidance.[131] Nonetheless, controversy over EPA's handling of civil rights and environmental justice issues continues.[132] One news report claimed in 1998 that "the Clinton administration's 'environmental justice' push has bogged down at virtually every turn as environmental idealism encountered the murky gray of economic and legal realities."[133]

In August 2000, an article in *USA Today* stated the EPA's "ill-defined plan to use civil rights laws as a tool to protect minority communities from industrial pollution" had resulted in taking jobs away from minority communities.[134] The *USA Today* article also charged that the EPA had failed to address complaints that its environmental justice guidelines were in conflict with inner-city revitalization plans in several major U.S. cities. The article also noted that adhering to the regulations is costly, so industrial firms find it cheaper to settle in areas that are not populated by minorities, resulting in the loss of potential jobs for the people who need them the most.[135] Ann Good, director of EPA's Office of Civil Rights, responded to the *USA Today* article, stating:

The Clinton-Gore Administration has a proven commitment to promoting economic development, particularly urban redevelopment. The draft guidance [on environmental justice] provided by EPA under Tile VI will strengthen the Administration's ongoing efforts to ensure that economic growth and strong environmental protections—and the protections of civil rights—go hand in hand.[136]

The EPA published draft guidance documents for public comment on June 27, 2000, that address issues raised by communities, state and local governments, industry groups, and civil rights groups.[137]

Overall, little progress was made on the issue of environmental justice during the eight years of the Clinton administration. Policies and pro-

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[125] U.S. Environmental Protection Agency (EPA), Office of Enforcement and Compliance Assistance, "Environmental Justice," accessed at <http://es.epa.gov/oeca/main/ej/index.html>.

[126] Exec. Order No. 12,898, 3 C.F.R. 859 (1995).

[127] *Id.* at § 1-101.

[128] *Id.* at § 1-102.

[129] EPA, "The EPA's Environmental Justice Strategy," Apr. 3, 1995, accessed at <http://www.epa.gov/docs/oejpubs/strategy/strategy.txt.html>.

[130] *See* EPA, "Draft Title VI Guidance," 65 Fed. Reg. 39650 (June 27, 2000) (stating, "Once the *Draft Revised Guidance for Investigation Title VI Administrative Complaints* is final, it will replace the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Interim Guidance) issued in February 1998").

[131] EPA, "Notification of Additional Public Listening Session on the Draft Title VI Guidance Documents," 65 Fed. Reg. 46916 (Aug. 1, 2000).

[132] *See, e.g.*, David Matio, "Murky rules stall EPA race policy: After 5 years, $50 million, agency hasn't solved one claim of civil rights violations," *The Detroit News*, Oct. 20, 1998, p. A1; John McQuaid, "EPA Caught in Cross-Fire Over Civil Rights," *The Times-Picayune* (New Orleans, LA), May 22, 2000, p. A8.

[133] Matio, "Murky rules stall EPA race policy," p. A1.

[134] "Rules Backfire on Minorities; Our view: Two years after promising fixes, EPA continues to stumble," *USA Today*, Aug. 29, 2000, p. 14A.

[135] Ibid.

[136] Ann Good, "Collaborative Effort is Key; Opposing view: EPA favors civil-rights enforcement, environmental protection," *USA Today*, Aug. 29, 2000, p. 14A.

[137] EPA, "Draft Title VI Guidance," 65 Fed. Reg. 39650 (June 27, 2000).

grams have been criticized by many groups, and as of April 2001 EPA guidance remained in draft form.

Fair Housing

Since the early 1990s, several initiatives have been implemented to address discrimination in housing. The Department of Justice, Housing and Civil Enforcement Section, commenced its testing program in 1992. The primary focus of the program is "to identify unlawful housing discrimination based on race, national origin, disability, or familial status."[138] Since the implementation of the program, DOJ has recruited and trained more than 500 employees throughout the nation to participate as testers.[139] According to DOJ, by creating the testing program, the department greatly enhanced its ability to enforce the Fair Housing Act.[140] The testing program has brought over $1.2 million in civil penalties and over $6.3 million in damages.[141]

On January 17, 1994, President Clinton issued Executive Order 12892.[142] This order created the Fair Housing Council, composed of all the heads of federal agencies with responsibility for fair housing enforcement and chaired by the Secretary of the Department of Housing and Urban Development (HUD). The purpose of this council is to ensure a coordinated federal fair housing enforcement effort.[143] In addition, HUD's Office of Fair Housing and Equal Opportunity was reorganized in an attempt to be more effective in implementing fair housing policies and enforcing the law.[144]

In 1997, the President unveiled the "Make 'Em Pay" Initiative.[145] This initiative was aimed at combating housing-related hate crimes. Concerning the initiative, the President said:

> The Fair Housing Act says every family in this nation has the right to live in any neighborhood and in any home they can afford. Our message to those who violate this law is simple: If you try to take this right away, we will make you pay—with higher fines and stepped up enforcement.[146]

The initiative also called for closer partnerships between HUD and DOJ, fair housing enforcement agencies, advocacy groups, and other organizations.[147]

The following year, upon the 30th anniversary of the Fair Housing Act of 1968, the President, the Secretary of Housing and Urban Development, and the Attorney General each made statements concerning the Fair Housing Act.[148] In his message, the President noted that although it is less apparent than in the past, housing discrimination persists and "the need to enforce fair housing laws vigorously remains as urgent today as ever."[149]

However, a recent review of federal fair housing enforcement efforts revealed mixed results. According to a report published by the Citizens' Commission on Civil Rights:

> On the positive side of the ledger, [HUD] Secretary Andrew Cuomo has done a remarkable job in a difficult political climate of protecting HUD's fair housing budget and of promoting certain high profile settlements . . . On the negative side, HUD has shown little

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[138] U.S. Department of Justice, Civil Rights Division (DOJ/CRD), Housing and Civil Enforcement Section, "Testing Program" updated Aug. 16, 2000, p. 1, accessed at <http://www.usdoj.gov/crt/housing/housing_special.htm.>

[139] Ibid.

[140] Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, "An Issue of Public Importance: The Justice Department's Enforcement of the Fair Housing Act," Apr. 19, 1999, p. 5, accessed at <http://www.usdoj.gov/crt/housing/housing_special.htm>.

[141] DOJ/CRD, "Testing Program," p. 2.

[142] Exec. Order No. 12,892, 3 C.F.R. 849 (1995).

[143] U.S. Department of Housing and Urban Development (HUD), *FY 1995 Budget Summary*, p. FHEO-8.

[144] HUD, *Congressional Justifications for 1995 Estimates*, part 2, March 1994, p. Q6.

[145] HUD, "Clinton Announces 'Make 'Em Pay' Crackdown Boosting Fines for Housing Discrimination Hate Acts," press release no. 97-261, Nov. 10, 1997, accessed at <http://www.hud.gov/pressrel/pr97-261.html>.

[146] Ibid.

[147] Ibid.

[148] The White House, Office of the Press Secretary, "Text of a Message from the President on the 30th Anniversary of the Federal Fair Housing Act," Apr. 10, 1998, accessed at <http://www.pub.whitehouse.gov>; U.S. Department of Justice, "A Message from the Attorney General on the 30th Anniversary of the Fair Housing Act," accessed at <http://www.usdoj.gov/crt/housing/ag2.htm>; HUD, "Cuomo Announced Record $2.1 Billion Lending Discrimination Settlement and Commemorates 30th Anniversary of Fair Housing Act," press release no. 98-146, Apr. 3, 1998, accessed at <http://www.hud.gov/pressrel/pr98-146.html>.

[149] The White House, "Text of a Message from the President on the 30th Anniversary of the Federal Fair Housing Act."

improvement over the last two years in its ability to process fair housing complaints effectively and expeditiously.[150]

In 1999, Bill Lann Lee, Acting Assistant Attorney General for Civil Rights at DOJ, noted that the Housing Section of the Department of Justice "recently established a major enforcement initiative that addresses discriminatory activities by lending institutions, especially discriminatory mortgage lending."[151] This initiative has not been limited to litigation. During the Clinton administration, the Housing Section tried to build relationships with industry to encourage voluntary compliance with fair lending laws.[152]

While a number of worthwhile initiatives have been undertaken, an increasing workload (for both HUD and the Housing Section of DOJ/CRD), combined with a stagnant budget and fewer case filings over the last few years, has resulted in little change in the nature and extent of housing discrimination.

Federal Protection for Indigenous Rights

Native Hawaiians and Other Pacific Islanders

The Clinton administration recognized the ongoing need to compensate Native Hawaiians for the United States' military role in the 1893 overthrow of the Hawaiian monarchy and unlawful taking of lands. One hundred years later, President Clinton signed into law the 1993 Apology Resolution,[153] which had been introduced by Senators Daniel K. Akaka and Daniel K. Inouye. The Apology Resolution apologized for and acknowledged the ongoing ramifications of the federal government's role in the illegal overthrow a century ago, and expressed the commitment of Congress and the President to support reconciliation efforts between the United States and Native Hawaiians. Following the 1993 Apology Resolution, the Native Hawaiian Education Act of 1994 and the Hawaiian Home Lands Recovery Act of 1995 were signed into law. These acts allocated funds for the education of Native Hawaiians and led to the conveyance of lands to the Department of Hawaiian Home Lands via a settlement agreement between it and the Department of the Interior in 1998.

Pursuant to Senator Akaka's recommendation, the reconciliation process included the Secretary of the Interior and the Attorney General appointing individuals within their respective agencies to consult with the Native Hawaiian community. In December 1999, the Departments of Justice and the Interior held hearings in Hawaii on the political status of Hawaii's indigenous people, land trust abuses, and compensation.

The reconciliation efforts were undermined by the recent Supreme Court decision in *Rice v. Cayetano*.[154] This decision held that the Office of Hawaiian Affairs' (OHA) voting procedure violated the 15th Amendment.[155] Despite this setback, on October 23, 2000, the Department of the Interior and the Department of Justice jointly issued the draft report, "From Mauka to Makai: The River of Justice Must Flow Freely."[156] This report detailed the reconciliation process between the federal government and Native Hawaiians. The report recommended, as a matter of justice and equity, that Native Hawaiian people should have self-determination over their own affairs within the framework of federal law, akin to Native American tribes. It also recommended that Congress enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a repre-

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[150] John P. Relman, "Federal Fair Housing Enforcement: The Second Clinton Administration at Mid-term," chap. XIX in CCCR, *The Test of Our Progress*, p. 231.

[151] Bill Lann Lee, "An Issue of Public Importance," p. 6.

[152] Ibid.

[153] Apology Resolution, Pub. L. No. 103-150, 103rd Congress (Nov. 23, 1993).

[154] 120 S. Ct. 1044 (2000).

[155] In 1979, a majority of Hawaiian voters voted for a state constitutional amendment to create OHA in recognition of the state's pressing obligation to address the needs of Hawaii's indigenous people. This amendment made OHA a native-controlled entity—its beneficiaries and trustees would be Native Hawaiians and the trustees would be elected by anyone with Hawaiian blood under terms established by the state legislature. In 1996, Harold Rice, a Caucasian rancher, sued Hawaii's governor Benjamin Cayetano to invalidate OHA's Native Hawaiian-only voting limitation. *See* Hawaii State Advisory Committee, "Reconciliation at a Crossroads: The Implications of Public Law 103-150 and Rice v. Cayetano on Federal and State Programs for Native Hawaiians," forthcoming, 2001.

[156] U.S. Department of the Interior and U.S. Department of Justice, "From Mauka to Makai: The River of Justice Most Flow Freely," Draft Report on the Reconciliation Process between the Federal Government and Native Hawaiians, Oct. 23, 2000.

sentative Native Hawaiian governing body. Other recommendations included (1) establishing an office in the Department of the Interior to address Native Hawaiian Issues, and (2) creating a Native Hawaiian Advisory Commission to consult with all bureaus within the Department of the Interior that manage land in Hawaii. With respect to compensation, the departments advocated for efforts to promote the welfare of Native Hawaiian people that respect their rights and address the wrongs their community has suffered.[157]

In addition, under the Clinton administration, the Office of Management and Budget separated for census purposes the "Asian or Pacific Islander Category" into two categories: "Asian" and "Native Hawaiian or Other Pacific Islander."[158] This separation may enable Native Hawaiian or Other Pacific Islanders to be eligible for programs and funds that would otherwise make them ineligible if the categories were combined with "Asians."

In its January 2001 interim report, the President's Advisory Commission on Asian Americans and Pacific Islanders recommended that the federal government recognize and include Native Hawaiians and Pacific Islanders in federal programs and services. Issues of self-determination and the return of lands are priorities. The diverse and rich cultural histories of indigenous Pacific Islander peoples and the manner in which the United States acquired Hawaii, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa are often neglected or seldom mentioned. The commission supported federal reconciliation with Native Hawaiians, which includes immediate attention to reducing the vast disparities in health, education, and income faced by Native Hawaiians and Pacific Islanders.[159]

Overall, the Clinton administration's record on reconciliation efforts with Native Hawaiians was strong and proactive, but the work remains unfinished.

[157] Ibid.

[158] Office of Management and Budget, "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," 62 Fed. Reg. 58781, 58782 (Oct. 30, 1997).

[159] The White House Initiative on Asian Americans and Pacific Islanders, *A People Looking Forward, Action for Access and Partnerships in the 21st Century*, Interim Report to the President, Jan. 17, 2001, accessed at <http://www.aapi.gov.intreport.htm>.

American Indians and Alaska Natives

During his administration, President Clinton was committed to strengthening the relationship between the federal government and tribal nations. In 1994, he invited the Native American and Alaska Native leaders of all federally recognized tribes to the White House to discuss the administration's domestic agenda and its effect on American Indians and Alaska Natives.[160] In that same year, the President issued a Government-to-Government memorandum to heads of executive departments and agencies directing them to "consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized governments."[161] The President issued an executive order in 1998 strengthening and making effective across administrations the 1994 Government-to-Government memorandum.[162]

President Clinton supported many issues of concern to Native Americans.[163] In the area of religion, he issued an executive order to protect Indian religious activities by preserving and accommodating access to sacred sites.[164] The President promoted tribal self-determination[165] and economic stability in Indian country.[166] He also advocated for improvements in Indian education, health care, and public safety.[167] For example, concerned with the increase in violent crime in Indian country, the President directed

[160] The White House, Office of the Press Secretary, "President Clinton to Hold Historic Meeting with Native Americans," Mar. 23, 1994, accessed at <http://clinton6.nara.gov>.

[161] William J. Clinton, Memorandum for the Heads of Executive Departments and Agencies, re: Government-to-Government Relations with Native American Tribal Governments, Apr. 29, 1994, 3 C.F.R. 1007 (1994).

[162] Exec. Order No. 13,084, 3 C.F.R. 150 (1998).

[163] The White House, Office of the Press Secretary, "President Clinton: A Record of Partnership with American Indians and Alaska Natives," Aug. 6, 1998, accessed at <http://www.clinton6.nara.gov>.

[164] Exec. Order No. 13,007, 3 C.F.R. (1996).

[165] The White House, Office of the Press Secretary, "President Clinton: A Record of Partnership with American Indians and Alaska Natives."

[166] The White House, Office of the Press Secretary, "President Clinton Announces Initiatives for Native Americans Related to Economic Development, Health Care, and Education," Aug. 6, 1998, accessed at <http://www.clinton6.nara.gov>.

[167] The White House, Office of the Press Secretary, "President Clinton: A Record of Partnership with American Indians and Alaska Natives."

the Departments of the Interior and Justice to work with tribal leaders to analyze law enforcement problems on tribal lands and develop options for improving public safety and criminal justice in Indian country.[168] As a result of this process, part of the President's Indian Country Law Enforcement Initiative, funding was sought to increase the number of law enforcement officers on Indian lands, provide more equipment, expand detention facilities, enhance juvenile crime prevention, and improve the effectiveness of tribal courts.[169]

In his budget requests, the President attempted to serve Indian tribes and people better; however, his requests for Indian programs never survived the appropriation process. In FY 1996, the year that cuts in Indian programs were most devastating, federal funding for Indian programs fell short 13 percent, or $581 million, from the President's budget request.[170] In his final year in office, President Clinton proposed an FY 2001 budget of $9.4 billion for Indian programs, a $1.2 billion increase over the previous year.[171] While this is the largest increase ever for Indian programs, it still does not meet needs.[172]

The unprecedented efforts of President Clinton to improve conditions for Native Americans were hindered by longstanding problems in most Indian communities caused by past discriminatory practices of the U.S. government. The work of the federal government has at various times profoundly harmed communities that it was meant to serve. Knowing that wrongs must be acknowledged before the healing can begin, in 2000, the Bureau of Indian Affairs issued a formal apology.[173] However, an apology is merely a symbolic first step. Much more needs to be done to address fundamental problems in a meaningful way.

USDA and Minority Farmers

During the Clinton administration, one of the greatest challenges facing the U.S. Department of Agriculture (USDA) was discrimination in its many programs. Numerous reports testified to significant problems confronting civil rights enforcement programs conducted by USDA agencies, particularly its Office of Civil Rights, which effectively was closed down in 1983.

Since the turn of the century, the number of minority farmers and minority-owned farms has declined at a faster rate than the number of white farmers and their farms. In 1992, only 18,816 black farmers remained, representing just 1 percent of all farmers.[174] Minority farmers are an important national resource and play a part in farming operations in all regions of the United States. Seventy-six percent of black farmers live in the South. Native American farmers live primarily in Arizona, California, Montana, New Mexico, Oklahoma, and Texas.[175]

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[168] William J. Clinton, Memorandum for the Attorney General and the Secretary of the Interior, re: Law Enforcement in Indian Country, Aug. 25, 1997, accessed at <http://www.clinton6.nara.gov>.

[169] The White House, "President Clinton and Vice President Gore: Encouraging Economic Development in Indian Country," accessed at <http://www.clinton2.nara.gov/WH/New/New_Markets/cities/pine_ridge_reservation_accomplishments.html>.

[170] *See generally* Susan Masten, president, National Congress of American Indians (NCAI), "Investing in Indian Nations: Building Tribal Self-Government and Economic Development," Prepared Statement on the FY 2001 President's Budget Request for Federal Indian Programs to the Senate Committee on Indian Affairs, Feb. 23, 2000 (hereafter cited as NCAI testimony). The most dramatic cuts in funding in FY 1996 were for the Bureau of Indian Affairs (BIA) ($322 million less), the Department of Housing and Urban Development's New Indian Housing ($134 million less), and the Indian Health Service (IHS) ($80 million less). Ibid.

[171] The White House, Office of the Press Secretary, "President Clinton Calls for Passage of His Historic FY 2001 Native American Initiative," Feb. 25, 2000, accessed at <http://clinton6.nara.gov/2000/02/2000-02-25-fact-sheet-on-passage-of-fy2001-native-american-initiative.html>.

[172] *See generally* NCAI testimony. The unmet need for programs and services in Indian country has been measured at $7.4 billion for the BIA and $15.1 billion for IHS.

[173] Remarks of Kevin Gover, Assistant Secretary, Indian Affairs, U.S. Department of the Interior, at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs, Sept. 8, 2000. *See* The Associated Press, "Indian Affairs Bureau Apologizes for its Past; A History of Racism, Relocations, and Massacres," *Newsday*, Sept. 9, 2000, p. A7.

[174] U.S. Department of Commerce, Bureau of the Census, *1992 Census of Agriculture*, AC92-A-51, vol. 1, Geographic Area Series, part 51, United States Summary and State Data, tables 16–17 (hereafter cited as Census, *1992 Census of Agriculture*). This figure represents a 98 percent decline in the number of farms operated by African Americans since 1920. Gary Cornelious, supervisor of media resources, Department of Journalism-Mass Communications, Iowa State University, and member, Black Farmers and Agriculturalists Association, Testimony before the House Agriculture Committee, Oct. 23, 1997. *See also* USCCR, *The Decline of Black Farming in America*, February 1982, pp. 2–3.

[175] Census, *1992 Census of Agriculture*, pp. 459–60. More than 400 Native American farmers operate farms in these states; 2,507 Native American farmers operate farms in Oklahoma alone. Ibid.

More than 3,000 Asian and Pacific Islanders farm in both California and Hawaii, and Oregon and Washington each are home to more than 200 Asian and Pacific Islander farmers. Large numbers of Hispanic farmers are located in California, New Mexico, and Texas.[176]

In the late 1990s, USDA took unprecedented steps toward addressing the myriad problems it was facing in eliminating discrimination in its programs. Under the leadership of Secretary Daniel R. Glickman, USDA created a Civil Rights Action Team (CRAT) in 1996 to look into allegations of discrimination and develop an action plan to eradicate discrimination.[177] The first CRAT report, issued in February 1997, found that serious problems confronting civil rights enforcement at USDA were systemic and encompassed every major area of the department's civil rights mission. In all, the report contained nearly 100 recommendations intended to realize the goal that "every USDA customer and employee be treated fairly and to finally solve the persistent problems" that had plagued USDA's civil rights enforcement efforts for years.[178] A Civil Rights Implementation Team of more than 300 USDA employees was given the task of implementing the 92 recommendations of CRAT.[179]

The CRAT report and a host of others have documented the problems USDA faces in establishing an effective civil rights enforcement program, throughout the department and within each of the individual agencies. The inquiries of importance now are the extent to which these agencies have implemented the many recommendations contained in these reports and the results that are obtained. It appears USDA has made some progress in analyzing its programs and policies and addressing discrimination. Secretary Glickman's commitment to confront the issue and the work done by USDA employees have brought national attention to the problem of discrimination in USDA programs.[180] In addition, an April 2000 USDA report notes that several of the original CRAT recommendations have been implemented.[181]

However, there is much work to be done. Efforts to improve the plight of minority farmers have provided little relief to the farmers. Bills pending in Congress have not been enacted. Further, in 1998 USDA's Office of Inspector General (OIG) noted that recommendations made by that office had not been implemented and the USDA civil rights office continued to be in "disorder."[182] In addition, the OIG found that the Office of Civil Rights was ineffective in resolving discrimination complaints.[183] Further, although steps were made to enable farmers to file discrimination complaints beyond previously established deadlines,[184] farmers still await justice. A class action lawsuit by black farmers, settled out of court, failed to bring sufficient relief.[185]

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[176] Ibid., pp. 460–62.

[177] U.S. Department of Agriculture (USDA), Civil Rights Action Team, *Civil Rights at the United States Department of Agriculture*, February 1997, p. 2.

[178] Ibid., pp. 58–92.

[179] USDA, Civil Rights Implementation Team, *Civil Rights at the Department of Agriculture: One Year of Change*, March 1998, p. 2 (hereafter cited as USDA, *One Year of Change*).

[180] USDA, *CRAT Report*, pp. 4–5. *See also* Angie Cannon, "The Strange Saga of the Black Farmers," *U.S. News & World Report*, Dec. 21, 1998, p. 30. *See generally* USDA, *One Year of Change*.

[181] USDA, Office of Communications, *Commitment to Progress: Civil Rights a the United States Department of Agriculture*, April 2000.

[182] USDA, Office of Inspector General, *Evaluation of the Office of Civil Rights' Efforts to Reduce the Backlog of Program Complaints*, Evaluation Report No. 60801-1-Hq, September 1998, pp. i–iii (hereafter cited as USDA/OIG, *OCR's Efforts to Reduce the Backlog*).

[183] Ibid., p. 26.

[184] Title VII of the Omnibus Consolidated and Emergency Supplemental Appropriations bill for FY 1999 included a provision to waive the statute of limitations for filing discriminations complaints. H.R. 4328, CONF. REP. NO. 105-825, at § 741 (1998), *reprinted in* 1998 U.S.C.A.A.N. 2681. *See* Dan Glickman, "Fairness for Black Farmers," *The Washington Post*, Nov. 13, 1998, p. A23. *See* USDA, Office of Communications, "It May Not Be Too Late for Your Complaint!" Program Aid No. 1641, December 1998.

[185] Pigford v. Glickman, 183 F.R.D. 428 (D.D.C. 1998) (declaring that black farmers constituted a class). *See* Peter Scott, "Judge Recognizes Black Farmers As Group in Lawsuit," *The Atlanta Journal and Constitution*, Oct. 10, 1998, p. 3F. The parties eventually agreed to a consent decree, however, many find the settlement to be insufficient. *See* Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999) (approving terms of consent decree that provided $2 billion in debt relief plus monetary payments for farmers); Michael A. Fletcher, "USDA, Black Farmers Settle Bias Lawsuit," *The Washington Post*, Jan. 6, 1999, p. A1; Charisse Jones, "Minority Farmers Say They've Been Cheated," *USA Today*, Jan. 5, 1999, p. 9A; Sack, "Bias Settlement is Too Late." *See also* Pigford v. Glickman, 206 F.3d 1212 (D.C. Cir. 2000) (benefits of consent decree challenged as being "illusory" because decree forbid defendant from providing relief in conflict with future federal regulations; court rejected and upheld terms of agreement). As of August 2000, many farmers still had not received their payments from the settle-

Further, in November 1999, 574 Native American farmers and ranchers, on behalf of 19,000 other Native Americans, filed a lawsuit against USDA on the grounds of neglect and discrimination.[186] The lawsuit, *Keepseagle v. Glickman*,[187] attempts to redress discrimination practiced by USDA, which has led to financial instability and even foreclosure of many Native American farms. More specifically, the plaintiffs in this case attest that they have been provided with less governmental support than their white counterparts and denied assistance based on their ethnic identity.[188] Furthermore, similar to the case, *Pigford v. Glickman*, that awarded black farmers over $375 million, Native American farmers are seeking punitive damages for the historic and continual discrimination by the USDA that has cost them their land.[189]

Recent reports in the news media indicate that USDA's Office of Civil Rights is still mired in problems.[190] In September 2000, Congress held another hearing on the performance of the Office of Civil Rights at USDA. In his opening remarks, Senator Dick Lugar stated:

> The most troubling aspect of these reports is how few of the deficiencies identified by either OIG or GAO in previous reports are ever corrected. Despite these reports and repeated efforts by USDA officials, the problems persist. Effective managers are not being hired to solve the problems, and employees are merely being shuffled from agency to agency in an appearance of problem solving and management revamping. Yet results have not emerged. The missing link here seems to be one of accountability—from the highest level of management to the county supervisor in the field who fails to adequately service an African American farmer's loan. Respect for the civil rights of all Americans is of paramount importance to me. I am committed to doing all I can to solve these problems at USDA.[191]

In his testimony at the hearings, John W. Boyd, Jr., president of the National Black Farmers Association, summed up the problem when he stated, "The American dream is still being denied to many American farmers."[192]

The Commission recognizes that Secretary Glickman and USDA acknowledged the existence of discrimination and made efforts to address such discrimination. Nonetheless, such efforts have made little impact on the plight of both minority and female farmers.

Equal Educational Opportunity

> *"There are very few venues in American society where people must encounter people who are different—people who are not like themselves in terms of race, religion, economic circumstance, and in other ways. Public schools are one venue in which Americans have an opportunity to confront each other and learn tolerance. Moreover, encounters among students take place on a daily basis and in a manner that oftentimes allows them to become, despite their differences, friendly acquaintances and even good friends. We believe that such acquaintances and friendships strengthen our nation by making the students more open, perhaps for the rest of their lives, to the idea of working with, living near, and worshiping with people who are different from themselves."*[193]
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> —U.S. Commission on Civil Rights, 1999

In October 2000, President Clinton announced several accomplishments in the educa-

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ment. Kia Shante Breaux, "Black farmers say government is slow, stingy about settlement money," The Associated Press State & Local Wire, Aug. 26, 2000. Further, some farmers have said their settlement claims have been denied or they have experienced harassment because of their claims. Michael A. Fletcher, "Black Farmers' Awards May Top $1 Billion; Some in Bias Case Say USDA Claims Process is Arbitrary, Too Slow," *The Washington Post*, June 20, 2000, p. A21.

[186] *See* "USDA a very racist organization," Sept. 13, 2000, accessed at <http://www.indianz.com/Smoke Signals/Headlines/showfull.asp?ID=lead/9132000>; Matt Kelley, "Indian farmers say USDA discrimination cost them their land," The Associated Press, Oct. 30, 2000, accessed at <http://www.Boston.com/LatestNews/Washington>; Bill Miller, "Native American Farmers Seek Class Action in Suit Against USDA," *The Washington Post*, Nov. 1, 2000, p. A13.

[187] Keepseagle v. Glickman, 194 F.R.D. 1 (D.D.C. 2000).

[188] *Id.*

[189] "Discrimination on the Land," *Indian Country Today (Lakota Times)*, The Ethnic NewsWatch, vol. 20, no. 1 (June 21, 2000), p. A4.

[190] *See* Anaradha Mittal and Joan Powell, "The Last Plantation," *Earth Island Journal*, no. 3, vol. 15 (Sept. 22, 2000), p. 23; Philip Brasher, "Investigators say civil rights office inept," The Associated Press State & Local Wire, Sept. 12, 2000; "700 Indians Join Suit Over Farming Loans," *Albuquerque Journal*, Sept. 12, 2000, p. C1.

[191] Dick Lugar, "Opening Statement on USDA Civil Rights Hearing," Congressional Press Releases, Sept. 12, 2000.

[192] John W. Boyd, Jr., president, National Black Farmers Association, Testimony before the Senate Committee on Agriculture, Nutrition and Forestry," Sept. 12, 2000.

[193] USCCR, *Schools and Religion*, December 1999, p. 249.

tion arena during his presidency.[194] In particular, the President noted that math and reading scores have improved and the number of students enrolled in advanced placement (AP) courses has increased. According to the President, the number of Hispanic students enrolled in AP courses increased 300 percent and the number of African American students enrolled in such classes increased 500 percent.[195]

President Clinton also issued several executive orders focusing on improving educational opportunities for minorities. Executive Order 12876 on historically black colleges and universities (HBCUs), originally issued in 1981, was reissued in 1993.[196] The executive order established an advisory committee within the Department of Education to report on the participation of HBCUs in federal programs. This initiative also addresses strategies to increase the private sector's role in strengthening HBCUs' institutional infrastructure, facilitating planning, and using new technologies to ensure the long-term viability of HBCUs.[197] In addition to soliciting funds and assistance on effective financial management techniques from the private sector, the initiative aims to enhance career prospects of HBCU graduates and increase the number of such graduates in the science and technology fields.[198]

The following year the President issued Executive Order 12900, "Educational Excellence for Hispanic Americans."[199] This order authorized a multiagency effort on Hispanic education, coordinated by the Department of Education (DOEd) similar to the HBCU Initiative. The executive order directs federal agencies to increase Hispanic American participation in federal education programs and improve educational outcomes for Hispanic Americans participating in federal education programs.[200] This objective requires that federal agencies aim to eliminate unintended regulatory barriers that can impede access to educational opportunities in school districts and postsecondary education institutions.[201]

Executive Order 13021 established a Tribal Colleges and Universities (TCU) Initiative, also modeled after the HBCU Initiative.[202] The TCU Initiative addresses funding levels in education, from pre-kindergarten to adult education and at tribal colleges and universities. Some of the objectives of the initiative are to (1) ensure that tribal colleges and universities have greater recognition among accredited institutions; (2) increase the level of federal resources channeled to tribal colleges and universities; (3) explore innovative approaches to integrate tribal postsecondary with early childhood, elementary, and secondary education programs; and (4) support the National Education Goals.[203] The executive order also fosters links between TCUs and nongovernment organizations.[204]

In 1998, the President signed Executive Order 13096, "American Indian and Alaska Native Education."[205] This order recognizes the federal government's role in improving the academic performance of American Indian and Alaska Native students. Thus, the order directs federal agencies to focus on six goals: (1) improving reading and mathematics skills, (2) increasing high school completion and postsecondary attendance, (3) reducing the influence of factors that impede educational performance such as poverty and substance abuse, (4) creating safe and drug-free schools, (5) improving science education, and (6) expanding the use of educational technology.[206] The executive order establishes a task force to oversee the implementation of the six goals and directs the Department of Education to develop a research agenda to assist in improving the educational achievement of American Indian and Alaska Native students.[207]

With these executive orders, the President put in place the resources and processes needed for addressing equal education outcomes and

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[194] The White House, Office of the Press Secretary, "Remarks by the President at Education Event," Oct. 2, 2000, accessed at <http://clinton4.nara.gov/textonly/WH/EOP/OP/html/Mon_Oct_2_120223_2000.html>. *See also* Ellen Nakashima, "Clinton Touts 'Education Revival,'" *The Washington Post*, Oct. 3, 2000, p. A4.

[195] The White House, "Remarks by the President at Education Event."

[196] Exec. Order No. 12,876, 3 C.F.R. 671 (1993).

[197] *Id.* at § 1.

[198] *Id.* at § 8.

[199] Exec. Order No. 12,900, 3 C.F.R. 865 (1995).

[200] *Id.* at § 6.

[201] *Id.*

[202] Exec. Order No. 13,021, 3 C.F.R. 221 (1997).

[203] *Id.*

[204] *Id.*

[205] Exec. Order No. 13,096, 3 C.F.R. 202 (1999).

[206] *Id.* at § 1.

[207] *Id.* at § 2.

opportunities for racial and ethnic minorities. In some ways, progress is being made. For example, in response to the executive order on Educational Excellence for Hispanic Americans, the Department of Education made information on education for Hispanics and the advisory board available on its Web site.[208] In addition, First Lady Hillary Rodham Clinton held a White House Convening on Hispanic Children and Youth in August 1999.[209] Further, through its Hispanic Employment Initiative, the Office of Personnel Management will work with federal agencies and education institutions to identify job opportunities for Hispanics to support the executive order.[210]

For its part, the Department of Education maintained civil rights enforcement efforts as a priority during the Clinton administration. Importantly, DOEd sought to focus its efforts on specific issues associated with the civil rights statutes it enforces. For example, on the 25th anniversary of Title IX of the Education Amendments of 1972,[211] the department noted:

> Too many women still confront the problem of sexual harassment, women still lag behind men in gaining a decent wage, and only one-third of all intercollegiate athletic scholarships are granted to women. Clearly, much more remains to be done to ensure that every American is given an equal opportunity to achieve success without encountering the obstacle of gender bias.[212]

DOEd's Office for Civil Rights also has recently issued revised regulations on Title VI,[213] proposed revisions to its guidance on sexual harassment,[214] and drafted guidance on high-stakes testing.[215] In addition, for the 25th anniversary of the Individuals with Disabilities Education Act (IDEA), DOEd released its 22nd Annual Report to Congress on the Implementation of IDEA and launched its new IDEA Web site.[216]

In June 1998, in response to a request from President Clinton, DOEd updated its statement of principles on religious expression in public schools and provided a copy to every public school in the country.[217] The guidelines discuss students' rights under the First Amendment and the Equal Access Act.[218] Further, the guidelines note that schools may not forbid students from expressing their religious views or beliefs solely because of their religious nature. The President noted, "Since we first issued those guidelines, appropriate religious activity has flourished in our schools and is continuing in this country."[219] In its 1999 report on schools and religion, the Commission noted that the Equal Access Act and DOEd's statement of principles are "two of the most effective tools currently being used to diffuse and decrease tensions in the area of schools and religion."[220]

In addition, the Clinton administration strengthened bilingual and immigrant education. It secured a 35 percent increase in bilingual and immigrant education in the 1997 budget deal, and in FY 1999, the administration fought for and won a doubling of the investments in bilingual training as part of its Hispanic Educa-

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[208] U.S. Department of Education (DOEd), "White House Initiative on Educational Excellence for Hispanic Americans," accessed at <http://www.ed.gov/offices/OIIA/Hispanic/index.html>.

[209] DOEd, "The First Lady's Convening on Hispanic Children and Youth," accessed at <http://www.ed.gov/offices/OIIA/Hispanic/index.html>.

[210] OPM, "OPM Proposes 9-Point Plan to Reverse Hispanic Underrepresentation," news release, Sept. 18, 1997, accessed at <http://www.opm.gov/pressrel/html/pr-9-pt.htm>.

[211] Pub. L. No. 92-318, Title IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (1994)).

[212] DOEd, *Title IX: 25 Years of Progress*, June 1997, p. 1.

[213] 65 Fed. Reg. 68050 (Nov. 13, 2000).

[214] 65 Fed. Reg. 66091 (Nov. 2, 2000).

[215] DOEd, Office for Civil Rights, "The Use of Tests When Making High-Stakes Decision for Students: A Resource Guide for Educators and Policymakers," draft, July 6, 2000, accessed at <http://www.ed.gov/offices/OCR/ocrnews.html>.

[216] *See* DOEd, "ED Initiatives," Dec. 1, 2000, accessed at <http://www.ed.gov/pubs/EDInitiatives/00/00-12-01.html>; DOEd, "IDEA, the Individuals with Disabilities Education Act: Lessons for ALL!" Dec. 1, 2000, accessed at <http://www.ed.gov/offices/OSERS/IDEA25th/>.

[217] DOEd, *Religious Expression in Public Schools: A Statement on Principles*, June 1998. *See* the White House, Office of the Press Secretary, "Radio Address by the President to the Nation [on religious diversity]," Dec. 18, 1999, accessed at <http://clinton6.nara.gov/1999/12/1999-12-18-radio-address-on-role-of-religion-in-public-schools.html>.

[218] 42 U.S.C. §§ 4071–4074 (1995 & Supp. 1999). The act applies when public secondary schools provide facilities for meetings of extracurricular student groups during noninstructional time and outlaw discrimination against student clubs on the basis of religion. *Id.*

[219] The White House, Office of the Press Secretary, "Radio Address by the President to the Nation [on religious diversity]."

[220] USCCR, *Schools and Religion*, pp. 1–3, 249.

tion Action Plan.[221] Funding for bilingual education helps school districts teach English to more than a million limited-English-proficient (LEP) children and helps LEP students to achieve the same high standards as all other students. The Immigrant Education Program helps more than 1,000 school districts provide supplemental instructional services to more than 800,000 recent immigrant students.[222]

On January 15, 2001, as he prepared to leave office, President Clinton signed an executive order establishing the President's Commission on Educational Resource Equity.[223] In the order, the President noted:

> [I]t is crucial that all children have access to the educational resources and opportunity necessary to achieve high standards, although we know longstanding gaps in access to educational resources exist, including disparities based on race and ethnicity. These gaps limit the ability of individuals, as well as our Nation, to reach their full potential. Therefore, it is the policy of this Administration that our Nation undertake appropriate steps to understand fully the current status of resource equity in education and to identify and implement strategies at the local, State, and national levels that will ensure that all students have a full and equal opportunity to succeed.[224]

The order directs the Commission on Educational Resource Equity to collect and review information on gaps in the availability of educational resources, including the underlying causes and effects of such resource gaps, and to prepare and submit a report for the President and the Congress not later than August 31, 2001.[225]

Despite progress, the work of increasing equal opportunity in education is far from complete.[226] Controversies over testing, teacher quality, after-school programs, limited-English-proficient students, affirmative action, and other matters continue to plague the nation's educational systems.[227] Although DOEd's Office for Civil Rights has attempted to address many of these issues, such as with its statement on religious expression in public schools and its controversial high-stakes testing guidance, several key civil rights issues in the education arena remain unresolved.[228]

Fair Employment in the Private Sector

As the U.S. Commission on Civil Rights reported in 1998 and 2000, the Equal Employment Opportunity Commission recently implemented several initiatives to improve its enforcement record and ensure equal employment opportunity for women, minorities, and persons with disabilities in the private sector.[229] Many of these, such as the Equal Pay Initiative, have received strong presidential support. For instance, in his proclamation on National Equal Pay Day, May 11, 2000, President Clinton stated:

> [T]he battle for equal pay for women is far from over. Although 37 years have passed since the passage of the Equal Pay Act, the average woman today must still work an additional 17 weeks a year to earn what the average man earns. That pay gap grows wider as women grow older, and it is widest for women of color. African American women earn 64 cents for every dollar earned by white men, and Hispanic women earn just 55 cents. While some of these disparities can be attributed to differences in education, experience, and occupation—which themselves often reflect troubling inequities—several studies confirm that a significant pay gap persists even after we account for these factors.[230]

In this proclamation, the President unveiled his budget proposal of $27 million in FY 2001 to "combat unfair pay practices against women."[231]

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[221] The White House, "President Clinton and Vice President Gore: Supporting Hispanic Americans."

[222] Ibid.

[223] Exec. Order No. 13,190, 66 Fed. Reg. 5424 (Jan. 15, 2000).

[224] *Id.* at § 1.

[225] *Id.* at § 3.

[226] *See* USCCR, *Equal Educational Opportunity Project Series*, vols. I–V.

[227] *See, e.g.*, Tamara Henry, "Learning to tell them apart; Gore, Bush have same goal: better education," *USA Today*, Sept. 26, 2000, p. 6D; Mike Allen, "Bush Declares 'Educational Recession,' GOP Nominee Says Texas Has Answers to Poor U.S. School Performance," *The Washington Post*, Sept. 26, 2000, p. A11; 60 Minutes, "Testing, Testing, Testing," Sept. 10, 2000 (transcript); Diane August, Dianne Piche, and Roger Rice, "Inclusion of Limited English Proficient Students in Title I: An Assessment of Current Practice," chap. XV in CCCR, *The Test of Our Progress*.

[228] *See* USCCR, *Equal Educational Opportunity Project Series*, vols. I–V; USCCR, *Schools and Religion*.

[229] USCCR, *Helping Employers Comply with the ADA: An Assessment of How the United States Equal Employment Opportunity Commission is Enforcing Title I of the Americans with Disabilities Act*, September 1998; USCCR, *Overcoming the Past, Focusing on the Future*.

[230] Proclamation No. 7306, 65 Fed. Reg. 3829 (May 11, 2000).

[231] *Id.*

In addition, the Clinton administration has supported legislation aimed at improving working conditions for women, minorities, and families. For example, the Family and Medical Leave Act of 1993[232] allows employees to take up to 12 weeks of unpaid leave per year for the following reasons: the birth or adoption of a child, placement of a foster child, serious health condition of the employee, or the need for the employee to care for a family member who has a serious health condition.[233]

Executive Order 13078, "Increasing Employment of Adults with Disabilities," was issued March 13, 1998. This order was issued "to increase the employment of adults with disabilities to a rate that is as close as possible to the employment rate of the general adult population and to support the goals articulated in the findings and purpose section of the Americans with Disabilities Act of 1990."[234] The order established the National Task Force on Employment of Adults with Disabilities, which is charged with developing "a coordinated Federal policy to reduce employment barriers for persons with disabilities."[235] The duties of the task force were expanded in October 2000, when President Clinton amended Executive Order 13078 to focus on education, employment, and other issues affecting young people with disabilities.[236]

In April 1999, President Clinton urged Congress to pass legislation that would strengthen existing laws prohibiting sex discrimination in wages.[237] The bill, the Paycheck Fairness Act,[238] provides for full compensatory and punitive damages as remedies for equal pay violations, in addition to liquidated damages currently available under the Equal Pay Act. The bill also would bar employers from punishing employees for sharing salary information with their coworkers. The proposed legislation would provide increased training for EEOC employees to identify and respond to wage discrimination claims, to research discrimination in the payment of wages, and to establish an award to recognize employers for eliminating pay disparities.[239]

The President also endorsed the Employment Nondiscrimination Act.[240] The act, which is modeled after Title VII, would prohibit employment discrimination on the basis of sexual orientation. In a statement for Gay and Lesbian Pride Month, the President reaffirmed his support of the bill:

> Gay and lesbian Americans have made important and lasting contributions to our Nation in every field of endeavor. Too often, however, gays and lesbians face prejudice and discrimination; too many have had to hide or deny their sexual orientation in order to keep their jobs or to live safely in their communities.
>
> In recent years we have made some progress righting these wrongs. . . . To build on our progress, in 1998 I issued an Executive Order to prohibit discrimination in the Federal civilian workforce based on sexual orientation, and my Administration continues to fight for the Employment Non-Discrimination Act, which would outlaw discrimination in the workforce based on sexual orientation.[241]

Upon signing Executive Order 13087, the President called for congressional action to include homosexual men and women under the protections of employment nondiscrimination laws, stating:

> This Executive order states administration policy but does not and cannot create any new enforcement rights (such as the ability to proceed before the Equal Employment Opportunity Commission). Those rights can be granted only by legislation passed by the Congress, such as the Employment Non-Discrimination

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[232] Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. § 2601 (1994))

[233] *See* Angie K. Young, "Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children," *Michigan Journal of Gender & Law*, vol. 5, p. 114.

[234] Exec. Order No. 13,078, 3 C.F.R. 140 (1998).

[235] *Id.* at § 1.

[236] Exec. Order No. 13,172, 65 Fed. Reg. 64577 (Oct. 25, 2000).

[237] "Clinton Calls for Passage of Legislation Strengthening Wage Discrimination Laws," *Daily Labor Report*, Apr. 8, 1999, p. AA-2; "President Urges Passage of Legislation To Strengthen Wage Discrimination Laws," *Employment Discrimination Report*, Apr. 14, 1999, p. 529. *See* William J. Clinton, "Remarks in a Roundtable Discussion on Equal Pay," 35 WEEKLY COMP. PRES. DOC. 597 (Apr. 7, 1999).

[238] Paycheck Fairness Act, H.R. 541, 106th Cong. § 2 (1999).

[239] "President Urges Passage of Legislation To Strengthen Wage Discrimination Laws," p. 529; "Clinton Calls for Passage of Legislation Strengthening Wage Discrimination Laws," *Daily Labor Report*, Apr. 8, 1999, p. AA-2.

[240] S. 2238, 103rd Cong. (1994); H.R. 4636, 103rd Cong. (1994); S. 1276, 106th Cong. (1999), H.R. 2355, 106th Cong. (1999).

[241] Gay and Lesbian Pride Month, 2000, Proclamation No. 7316, 65 Fed. Reg. 36051 (June 2, 2000).

Act. I again call upon Congress to pass this important piece of civil rights legislation which would extend these basic employment discrimination protections to all gay and lesbian Americans. Individuals should not be denied a job on the basis of something that has no relationship to their ability to perform their work.[242]

Strong enforcement of Title VII and other employment nondiscrimination laws is still needed.[243] Complaints of discrimination in employment remain high and federal agencies, such as EEOC and the Office of Federal Contract Compliance Programs of the Department of Labor, have not received budget appropriations commensurate with their workloads.[244] Thus, enforcement efforts have not been maximized during this time.

Equal Access to Health Care

One of the early failures of the Clinton administration was the demise of the Health Security Act,[245] which was based on the belief that the nation's health care system should provide universal access to health care for all Americans. This concept met strong opposition from conservatives who argued that over-regulation would harm the health care industry. In his January 25, 1994, State of the Union address, President Clinton pressed Congress for legislation that would provide universal health insurance coverage:

> If we just let the health care system continue to drift [in its present direction, Americans] will have less care, fewer choices and higher bills. . . . If you send me legislation that does not guarantee every American private health insurance that can never be taken away, you will force me to take this pen, veto the legislation, and we'll come right back here and start all over again.[246]

Ultimately, the original health care reform plan was not approved. In the wake of this failure, health care reform advocates set upon a new political strategy with an incremental approach. This tactic, which attacked various aspects of the health care status quo piecemeal, has met with some success. Examples of enacted laws relating to health care reform include the Health Insurance Portability and Accountability Act of 1996[247] and the Balanced Budget Act of 1997.[248] More recent proposals include the Health Professions Education Partnerships Act of 1998[249] and the Medical Information Privacy and Security Act.[250] Several bills designated as patients' bill of rights bills were introduced in 1999.[251] The issues that these bills address are much the same, particularly with respect to their attention to nondiscrimination and equal access to health services. Nonetheless, as President Clinton prepared to leave office, he continued to call for national attention to health care issues, such as health insurance and Medicare.[252]

Overall, there was little improvement in health status or access to health care and health financing for many Americans, particularly women and minorities, during the eight years of the Clinton administration.[253] In 1999, the Commission evaluated the efforts of the Department of Health and Human Services in combating health disparities and discrimination in

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[242] *Id.*

[243] *See* USCCR, *Helping Employers Comply with the ADA*; USCCR, *Overcoming the Past, Focusing on the Future*.

[244] *See* USCCR, *Funding Federal Civil Rights Enforcement: 2000 and Beyond*.

[245] S. 2296, 103rd Cong. (1993); H.R. 3600, 103rd Cong. (1993).

[246] "The State of the Union Address: 'Let Us Resolve to Continue the Journey of Renewal,' " *The Washington Post*, Jan. 26, 1994, p. A12 (cited in Lawrence O. Gostin, "Securing Health or Just Health Care? The Effect of the Health Care System on the Health of America," *St. Louis University Law Review*, vol. 34 (Fall 1994), p. 7).

[247] Pub. L. No. 104-191, Title VI, § 601, 110 Stat. 1936 (codified at 42 U.S.C. §§ 300gg–300gg-92 (Supp. II 1996)).

[248] Pub. L. No. 105-33, 111 Stat. 251 (codified in scattered sections of 7, 26, and 42 U.S.C. (Supp. III 1997)).

[249] S. 1754, 105th Cong., 2d Sess. (1998).

[250] S. 573, 105th Cong., 2d Sess. (1998).

[251] On Jan. 19, 1999, the Democrats introduced S. 6, 106th Cong. (1999), S. 240, 106th Cong. (1999), and H.R. 358, 106th Cong. (1999), all of which were "patients' bill of rights" bills. Republican proposals so far include the Patients' Bill of Rights Plus Act (S. 300, 106th Cong. (1999)) that Senator Lott introduced on Jan. 22, 1999; and a Patients' Bill of Rights Act (S. 326, 106th Cong. (1999)) that Senator Jeffords introduced on Jan. 28, 1999. *See* Karen Foerstel, "Debate on Patients' Protection Bursts Into Open as Rep. Ganske Gives GOP Dreaft to Reporters," *CQ Weekly*, May 1, 1999, p. 1025. Note that the Jeffords bill is also known as the "Healthcare Research and Quality Act of 1999." S. 326, 106th Cong. (1999).

[252] *See, e.g.*, President William J. Clinton, "The Year 2000 State of the Union," transcript, *Vital Speeches*, vol. 66, no. 9 (Feb. 15, 2000), p. 258.

[253] *See* USCCR, *The Health Care Challenge*, vols. I and II.

the health care system. The Commission concluded that Health and Human Services' Office for Civil Rights needed to play a more active role in monitoring health care to ensure that policies and practices that are either discriminatory or have a disparate impact on minorities and women are eradicated.[254] One example of the office's recent work is its collaboration with USDA and other HHS agencies to develop guidance on inquiries to immigration and citizenship status in applications for state services.[255] The office also recently released guidance on services for persons with limited English proficiency.[256]

Some HHS components have recently developed programs that address disparities in health status and the receipt of health services. For example, the Office on Women's Health, the Office of Research on Minority Health, and the National Institutes of Health have been involved in many initiatives aimed at eliminating health disparities.[257] Further, following its Healthy People 2000 Initiative,[258] HHS announced its Healthy People 2010 Initiative, which is "a statement of national priorities—a tool that identifies the most significant preventable threats to health and focuses public and private sector efforts to address those threats."[259] Proposed goals for this new initiative are increasing quality and years of healthy life and eliminating health disparities.[260]

In many instances, women and minorities continue to face barriers in accessing quality health care services. However, it is significant that HHS acknowledged these disparities and that President Clinton supported several bills aimed at addressing such disparities.

The Impact of Welfare Reform on Women and Minorities

On August 22, 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).[261] Under this federal welfare reform legislation, a new block grant program called Temporary Assistance for Needy Families (TANF) was established, which replaced the Aid to Families with Dependent Children (AFDC) program.[262] The goal of programs like TANF is to promote work and end long-term welfare dependency. A five-year lifetime limit on assistance is one of the program's central provisions. In addition, there is a two-year limit on the time anyone can receive assistance without working.[263] Upon enactment of the law, the President stated:

> This Act honors my basic principles of real welfare reform. It requires work of welfare recipients, limits the time they can stay on welfare, and provides child care and health care to help them make the move from welfare to work. It demands personal responsibility, and puts in place tough child support enforcement measures. It promotes family and protects children.[264]

The new law established guidelines that were intended to maintain access to Medicaid, and in some states, make the eligibility standards more inclusive. However, two provisions of the welfare reform law have caused some individuals to lose

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[254] Ibid.

[255] U.S. Department of Health and Human Services (HHS) and U.S. Department of Agriculture, "Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits," September 2000, accessed at <http://www.hhs.gov/ocr/immigration/triagency.html>.

[256] 65 C.F.R. 52762–52774 (Aug. 30, 2000).

[257] USCCR, *The Health Care Challenge*, vol. I, chap. 4. *See, e.g.*, HHS, Press Office, "HHS Strategies for Improving Minority Health," fact sheet, Apr. 14, 2000, accessed at <http://www.hhs.gov/news/press/2000pres/20000414.html>; HHS, Press Office, "Improving Women's Health," fact sheet, Mar. 12, 1999, accessed at <http://www.hhs.gov/news/press/1999pres/990312.html>.

[258] HHS, *Healthy People 2000: National Health Promotion and Disease Prevention Objectives*, 1991.

[259] HHS, "Healthy People 2010 Fact Sheet," accessed at <http://web.health.gov/healthypeople/2010fctsht.htm>.

[260] HHS, "What is Healthy People?," accessed at <http://www.health.gov/healthypeople/About/whatis.htm>. *See also* USCCR, *The Health Care Challenge*, vol. I, pp. 122–23.

[261] Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C §§ 1309–1397b and in scattered sections of 26, 42, and 47 U.S.C. (Supp. II 1996)).

[262] *See* Pub. L. No. 104-193, Title I, § 103(a), 110 Stat. 2110 (codified as amended at 42 U.S.C. §§ 601–619 (Supp. II 1996)). *See also* 45 C.F.R. pts. 98, 99 (1998); U.S. Department of Health and Human Services, Administration for Children and Families, "Welfare: Temporary Assistance for Need Families (TANF)," fact sheet, Feb. 13, 1998, accessed at <http://www.acf.dhhs.gov/programs/opa/facts/tanf.htm>.

[263] USCCR, *The Health Care Challenge*, vol. I, pp. 106–09.

[264] The White House, Office of the Press Secretary, "Statement by the President [on welfare reform]," Aug. 22, 1996, accessed at <http://clinton6.nara.gov/1996/08/1996-08-22-president-statement-on-welfare-reform-bill.html>.

Medicaid eligibility.[265] PRWORA tightened the eligibility criteria for coverage of disabled children under Supplemental Security Income (SSI) (although some of these children may qualify for Medicaid under other criteria) and required a waiting period of five years before immigrants become eligible for Medicaid.[266] As a result, welfare policy moved toward a policy that "systematically discriminates against most noncitizens."[267] For example, in its 1999 report on health care, the U.S. Commission on Civil Rights noted that the new law had:

> changed the structure of public assistance and consequently affected health care both directly and indirectly. One of the direct effects of welfare reform has been a reduction in Medicaid utilization by those who qualify, and ultimately an increase in the number of uninsured. A second, less direct but perhaps more critical, result has been the subsequent increase in poverty among those needing assistance. This in turn has caused a worsening of health status and an increase in the need for health care services.[268]

The Commission concluded that "[d]ue to the disproportionately large numbers of women and minorities who rely on Medicaid for health care coverage, these changes will have a disparate impact on their ability to obtain medical services."[269]

Overall, welfare reform appears to have affected minorities more severely than nonminorities. Although welfare caseloads have declined overall, the decline has been less dramatic for African Americans and Hispanics.[270] And welfare caseloads in areas with high concentrations of minorities are declining at slower rates than in other areas.[271] According to the Citizens' Commission on Civil Rights, employment barriers, such as discrimination, language difficulties, lack of skills, and transportation problems, have not been adequately addressed by PRWORA and the restructuring of welfare programs.[272]

In signing the PRWORA into law, President Clinton allowed the removal of important safety nets for low-income people and immigrants. The Citizens' Commission on Civil Rights noted:

> The disparities in the rates of decline may suggest that minority populations are encountering more problems and barriers than non-minorities when trying to exit welfare programs. At a minimum, such disparities raise questions about whether various changes in welfare rules are having uneven effects. And the growing concentration of welfare caseloads in some urban areas only heightens concerns that certain communities may be further marginalized and receive lesser services.
>
> In addition to these demographic shifts, the impact of recent welfare changes on disabled individuals and ethnic minorities, particularly those with language barriers, also demands attention.[273]

Although the PRWORA includes provisions related to fair treatment and nondiscrimination in welfare programs, many groups are concerned that these provisions are not strong enough or properly monitored by state agencies. Further, the federal agencies that enforce civil rights protections within welfare programs, most notably HHS and the Department of Labor, have been slow to issue regulations and guidelines on civil rights enforcement related to such programs.[274]

There is concern that welfare recipients transitioning to work are subject to racial and gender stereotyping, pay discrimination, sexual harassment, and other barriers, making it difficult for individuals to obtain or keep the jobs they are required to have under the new law.[275]

In addition, the law does not take into account the impact on children who are U.S. citizens living with non-citizen parents. Although the children retain their eligibility for certain welfare benefits, the parents do not. Thus, families with "mixed" immigration status may lose part of their benefits, such as food stamps, that were available to them before welfare reform.[276]

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[265] USCCR, *The Health Care Challenge*, vol. I, p. 106.

[266] Ibid.

[267] Michael Fix and Wendy Zimmerman, "The Legacies of Welfare Reform's Immigrant Restrictions," chap. XI in CCCR, *The Test of Our Progress*, p. 143.

[268] USCCR, *The Health Care Challenge*, vol. I, p. 106.

[269] Ibid., p. 107.

[270] Joceyln C. Frye and Su Sie Ju, "The Civil Rights Impact of Recent Welfare Changes," chap. X in CCCR, *The Test of Our Progress*, p. 123.

[271] Ibid.

[272] Ibid., pp. 122–23.

[273] Ibid.

[274] Ibid., pp. 127–34.

[275] Ibid., pp. 126–27.

[276] Fix and Zimmerman, "The Legacies of Welfare Reform's Immigrant Restrictions," p. 146.

While the PRWORA appears to have had some success in its primary goal of reducing welfare dependency,[277] there have been differential impacts on certain groups. Further, the long-term effects of these policies on women, minorities, and immigrants remain to be seen.

Ensuring Civil Rights Protections for Immigrants

"More than 20 percent of U.S. residents are either immigrants or the American-born children of immigrants. Immigrants are our neighbors, colleagues, employers and employees. Yet this important segment of society is often alienated or denied basic civil rights. . . . Instead of the promise of safety, shelter and fair process, many [detainees] find themselves deprived of liberty with inadequate access to legal [assistance], summarily deported, and barred from appealing to the courts. Even long-resident legal immigrants have fewer rights today that they enjoyed five years ago."[278]

—Martha Barnett, president of the American Bar Association

During the past decade, there have been numerous federal laws, policies, and initiatives affecting immigration, with respect to both documented and undocumented immigrants. Some of these actions have been positive. For instance, in May 1999, the Vice President announced new actions to assure families that enrolling in Medicaid or the Children's Health Insurance Program and receiving other critical benefits, such as school lunch and child care services, will not affect their immigrant status. In addition, the Clinton administration's FY 2001 budget included $75 million for the English Language/Civics Initiative, which will help an additional 250,000 limited-English-proficient individuals have access to civics classes and life skills instruction in English. The administration took a strong stand against promoting English as the official language of new immigrants and others seeking to learn English as adults.[279]

Notwithstanding these inclusive measures, there has been a wave of negativism toward and evidence of violence and discrimination against immigrants. Further, internal problems at the Department of Justice, Immigration and Naturalization Service (INS), have furthered affected immigrants residing in the United States.

Immigration Legislation

One important piece of legislation shaping the nation's policy on immigration during the last decade was the Immigration Act of 1990, signed by President George Bush.[280] Among other things, this act revised the Immigration and Nationality Act to establish numerical limits and a preference system regulating permanent legal immigration.[281] In response to the criticism of employer sanctions at the time, the 1990 act expanded the antidiscrimination provisions of the Immigration Reform and Control Act (IRCA) and increased the penalties for unlawful discrimination.[282] By the mid-1990s, however, immigration policies and laws became more restrictive than they previously had been.[283] The new constraints on immigrants were implemented to control illegal entry into the United States. These initiatives targeted certain immigrants who were viewed as the cause for employment

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[277] According to the White House Office of the Press Secretary, since 1993, the number of persons on welfare has decreased dramatically. In addition, there has been a 68 percent increase in child support collections since 1992. Further, initiatives have been set in place to encourage businesses to hire people from the welfare rolls and to provide mentoring services for welfare recipients. The White House, Office of the Press Secretary, "Clinton-Gore Accomplishments Reforming Welfare," May 27, 1998, accessed at <http://clinton.nara.gov>.

[278] Martha Barnett, president, American Bar Association, Remarks Before the U.S. Commission on Civil Rights, Dec. 8, 2000, pp. 1–2 (hereafter cited as Barnett, Remarks Before USCCR).

[279] The White House, "President Clinton and Vice President Gore: Supporting Hispanic Americans."

[280] Immigration Act of 1990, 8 U.S.C. § 1324(b) (1994). *See* Congressional Research Service (CRS), *Report for Congress on the Immigration Act of 1990*, Dec. 14, 1990 (hereafter cited as CRS, Immigration Act of 1990).

[281] CRS, Immigration Act of 1990, Summary.

[282] Ibid. Among the amendments adopted were provisions to (1) require an educational outreach program to apprise employers and employees of the antidiscrimination provisions under IRCA and Title VII, to be conducted by the special counsel, in coordination with the EEOC, DOL, and SBA; (2) extend the antidiscrimination protections to seasonal agricultural workers; (3) prohibit retaliation against employees for filing IRCA discrimination complaints; (4) prohibit employers from asking for "more or different documents than are required" from applicants, or refusing to honor documents that reasonably appear to be genuine; and (5) increase the penalties against employers who discriminate.

[283] Debra L. DeLaet, *U.S. Immigration Policy in an Age of Rights* (Westport, CT: Praeger Publishers, 2000), p. 103. Prior to the Clinton administration, changes in federal laws protected immigrants by expanding antidiscrimination provisions and increasing penalties for employers' unlawful discrimination against them.

problems and costly federal and state government programs and benefits.[284]

The Illegal Immigration Reform and Responsibility Act of 1996[285] introduced new methods of deterring and punishing illegal immigration, such as limitations on the ability of immigrants to bring class action suits and measures to minimize document fraud. With passage of the act, Congress provided the INS an expanded budget in FY 1997 to strengthen border patrols and the detention and removal of undocumented persons, and to enforce immigration laws in the workplace.[286] Overall, the Clinton administration did not act to protect civil rights interests that were threatened by this law, which had several negative consequences. In many instances, the law has led to the unfair splitting up of families, the imprisonment of nonviolent persons with hard core criminals, and deportation for minor infractions of the law.

For example, the law expanded the grounds for automatic deportation, which now includes petty offenses and offenses that have been expunged or vacated.[287] The law is applied retroactively so that minor infractions, such as shoplifting and joyriding many years before the law was changed, can lead to deportation today.[288] Further, the law provides for expedited removal of persons seeking to enter the United States with no documents or fraudulent documents, unless they are seeking asylum.[289]

The 1996 law also placed severe restrictions on due process, limiting judicial review of deportation and custody decisions and giving lower-level INS personnel the power to deport immigrants without higher-level approval.[290] Further, those seeking asylum are mandatorily detained while their cases are pending. According to the executive director of Amnesty International, asylum seekers are:

> confined with criminal prisoners but, unlike them, are frequently denied any opportunity to contest their detention or post bond. They are held in conditions that are sometimes inhuman and degrading, and are stripped and searched, shackled and chained, verbally or physically abused.[291]

New constraints on immigrants also were imposed by the welfare reform legislation of 1996. In addition to making sweeping changes in eligibility requirements of welfare recipients, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 rendered legal immigrants no longer automatically eligible for federal assistance programs in which benefits were based on income, resources, or financial need. As a result, permanent residents who became U.S. citizens must wait five years before becoming eligible for many of these programs. The new law allowed states to bar legal immigrants from state public benefits, as well.[292] However, to address many of these unintended consequences, in 1997 President Clinton signed legislation that restored some of the benefits that were cut in the welfare reform legislation of 1996.[293]

In October 2000, President Clinton signed into law the American Competitiveness in the Twenty-First Century Act.[294] This law will increase the number of H-1B visas available to highly skilled foreign temporary workers. It will also double the fee charged to employers hiring workers under this program. The increased fees will provide funding to train U.S. workers and students in technical fields where there is a shortage of U.S. workers.[295] As he signed this

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[284] Ibid.

[285] 8 U.S.C. § 1101 (1998).

[286] 8 U.S.C. § 1356 (1999). *See also* U.S. Department of Justice, Immigration and Naturalization Service, "Record 1997 INS Budget Focuses on Border Control and Detention and Removal of Illegal Aliens," news release, Jan. 14, 1997, p. 1.

[287] Barnett, Remarks Before USCCR, p. 3.

[288] Ibid.

[289] William F. Schulz, executive director, Amnesty International USA, Remarks Before the U.S. Commission on Civil Rights, Dec. 8, 2000, p. 1 (hereafter cited as Schulz, Remarks Before USCCR).

[290] Barnett, Remarks Before USCCR, p. 6.

[291] Schulz, Remarks Before USCCR, p. 4.

[292] *See* USCCR, *The Health Care Challenge;* USCCR, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination, Volume IV: The Miami Report,* October 1997, pp. 94–96; DeLaet, *U.S. Immigration Policy in an Age of Rights,* pp. 107–08, 126–27.

[293] The Balanced Budget Act of 1997, Pub. L. No. 105-33 (1997). *See generally* Fix and Zimmerman, "The Legacies of Welfare Reform's Immigrant Restrictions." *See also* DeLaet, *U.S. Immigration Policy in an Age of Rights,* p. 108.

[294] S. 2045, 106th Cong. (2000); H.R. 5362, 106th Cong. (2000). *See* the White House, Office of the Press Secretary, "Statement by the President [on the signing of the American Competitiveness in the Twenty-First Century Act]," Oct. 17, 2000, accessed at <http://clinton6.nara.gov/2000/10/2000-10-17-statement-by-the-president-on-competitiveness-in-the-21st-century.html>.

[295] Ibid. The H-1B program allows for the hiring of a limited number of highly skilled foreign workers for temporary employment in the United States. *See* Fawn H. Johnson,

new act, however, President Clinton urged Congress to pass the Latino and Immigrant Fairness Act,[296] which would allow persons who have lived in the United States for 15 years or more to become permanent residents.[297] In a separate statement, the President noted that failure to pass the Latino and Immigrant Fairness Act "would perpetuate the current patchwork of contradictory and unfair immigration policies."[298] On December 21, 2000, the President signed into law the Legal Immigration and Family Equity Act, which was proposed as an alternate to the Latino and Immigrant Fairness Act.[299]

Violence and Exploitation

In 1999, the United States signed a Memorandum of Agreement (MOU) with Mexico concerning violence along the U.S.-Mexico border. In the MOU both countries pledged to take steps to develop procedures for responding to incidents of violence, to formalize communication between U.S. attorneys and Mexican consuls along the border, and to establish a working group to monitor such efforts.[300] However, incidents of discrimination and violence along the U.S.-Mexico border continue to be reported. A news article reported that while increased Border Patrols by the INS have already made it more difficult to obtain illegal entry into the United States, some ranchers continue to practice vigilant efforts on their own to prevent border crossings.[301]

Others have charged that the increased INS activity has negatively affected U.S. citizens and permanent residents as well as those attempting to enter the country illegally. A report of the National Council of La Raza (NCLR) underscores the impact of increased border patrols on Latinos:

> Efforts such as increased workplace raids, an escalating number of armed INS agents along the border and the interior, and more joint operations between INS and other local and federal law enforcement agencies have served to undermine the physical safety and constitutional and civil rights of Latino communities. NCLR has noted that civil rights violations and abuse have been committed in the process of enforcing immigration laws. Incidents of illegal or inappropriate seizers, traffic stops based solely on ethnic appearance (racial profiling), arrests made without cause, deprivation of food, water, or medical attention, and actual physical abuse have been recorded. Many victims of abuse and mistreatment by immigration authorities are U.S. citizens or legal permanent residents.[302]

Both legal and undocumented immigrants are reporting more abuse, mistreatment, and discrimination, particularly by employers. In recent years, EEOC has experienced dramatic increases in both the numbers of charges of harassment based on national origin and the amount of monetary awards the agency has obtained on behalf of the workers filing these

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"President Signs High-Tech Visa Bill Raising Annual Cap Through Fiscal 2003," *Daily Labor Report*, Oct. 19, 2000, p. A7.

[296] S. 3068, 106th Cong. (2000).

[297] *See* the White House, "Statement by the President [on the signing of the American Competitiveness in the Twenty-First Century Act]."

[298] The White House, Office of the Press Secretary, "Statement by the President [on the Latino and Immigrant Fairness Act]," Oct. 30, 2000, accessed at <http://clinton.nara.gov>.

[299] U.S. Department of Justice, Immigration and Naturalization Service, "Legal Immigration and Family Equity Act," fact sheet, Dec. 21, 2000, accessed at <http://www.ins.usdoj.gov/graphics/publicaffairs/factsheets/LIFEAct.htm>.

[300] The White House, Office of the Press Secretary, "Fact Sheet: U.S.-Mexico Cooperation Against Border Violence," Feb. 15, 1999, accessed at <http://clinton6.nara.gov/1999/02/1999-02-15-us-mexico-cooperation-against-border-violence.html>.

[301] William Booth, "Emotions on the Edge: Arizona Ranchers Face Tide of Mexicans Along Border," *The Washington Post*, June 21, 2000, pp. A1, A12; Michael Janofsky, "Immigrants Flood Border in Arizona, Angering Ranchers," *The New York Times*, June 18, 2000, pp. A1, A14. In addition to the ranchers, the Border Patrol itself has been accused of being overzealous in the conduct of its mission. One news report indicates that Border Patrol agents in California crossed into Mexico to capture suspected undocumented persons. The article reports that "border conflicts have been a chronic problem," and weapons have been drawn between Mexican soldiers and U.S. police over the matter. "U.S., Mexico Probe Reported Border Breach," *The Washington Post*, July 16, 2000, p. A18. As a result, undocumented persons from Mexico are finding new entry points. Further, it has been argued that the focus of controlling illegal entry into the United States has been on the southern borders, where the majority of the undocumented persons are Mexicans, while very little attention has been on controlling illegal entry of non-Hispanic immigrants coming in from the northern borders. Reportedly, the INS has stated that it also recognizes that all of the undocumented persons are not coming just from the southern borders, and intends to examine northern border issues. Donna Leinwand, "Report: Canada—USA Border Full of Holes: Illegal Immigrants, Smugglers Have Little Trouble Getting In," *USA Today*, July 14, 2000, p. 3A. *See generally* Karen Hastings, "Crossing the Line," *Civil Rights Journal*, vol. 5, no. 1 (Fall 2000), pp. 12–17.

[302] National Council of La Raza (NCLR), *The Mainstreaming of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the '90s*, July 26, 1999, p. 20.

charges.[303] To help these workers, in February 2000, the Department of Justice initiated a toll-free hotline that immigrant workers can call to report exploitation.[304] Other recent efforts to address the problems faced by immigrants include proposed legislation such as the Battered Immigrant Women Protection Act.[305]

The Immigration and Naturalization Service

The Immigration and Naturalization Service has been beset by several controversies and internal problems that existed at the agency long before the Clinton administration. Problems plaguing the agency include poor customer service, unequal attention to service and enforcement, growth in workload, problems with technology, a lack of accountability, and an agency mentality that presumes violations.[306] Further, the National Council of La Raza has stated that, in addition to being "one of the most negligent federal government agencies in handling and processing civil rights complaints," the INS does not effectively handle grievances concerning misconduct of INS personnel.[307]

Concerning customer service, the Carnegie Endowment for International Peace noted:

> While some noteworthy improvements in service are in place, and more are slated for the future . . . the day-to-day service to immigrants and U.S. citizens at immigration offices around the country does not appear to have improved materially despite the enormous increase in agency funding. Lines at district offices remain long, telephones go unanswered, files are lost, information about both particular cases and general polices remains difficult to obtain, and the public's experience with INS service personnel continues to be the agency's number one image problem.[308]

As a result, inadequate service "erodes support for INS, undermines the credibility of its policy initiatives, and breeds a self-reinforcing negative culture among agency personnel who receive so many daily complaints that they come to view their customers as adversaries."[309]

A backlog in processing applications for both permanent residency status and citizenship has been one of INS' longstanding deficiencies. The agency had been unable to keep up with its increasing workload that was, in part, the result of immigration reform efforts of the mid-1980s that offered amnesty to millions of undocumented persons.[310] In 1995, with a backlog of almost 600,000 applications, the agency initiated a new program called Citizenship USA.[311] The program was aimed at streamlining and speeding up the naturalization process, yet was met with much criticism.[312] In response to concerns about the appropriateness of background checks and citizenship examinations and other questions surrounding the Citizenship USA program, INS

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[303] *See* Stephanie Armour, "Immigrants Become Easy Targets for Abuse, Harassment on the Job: Workers Arrive for Employment, Find Exploitation Instead, Immigrants' Claims of On-Job Harassment Skyrocket," *USA Today*, July 27, 2000, pp. 2A–2B; Kristin Downey Grimsley, "Immigration Workers Abused, EEOC Says," *The Washington Post*, June 22, 2000, Business section E.

[304] Armour, "Immigrants Become Easy Targets for Abuse, Harassment on the Job," p. 2B.

[305] H.R. 3083, 106th Cong. (1999). The pending legislation would provide immigrant women and children who experience domestic violence at home with protection against deportation, allow them to obtain protection orders against their abusers, and free them to cooperate with law enforcement and prosecutors in the criminal cases. The bill also promotes criminal prosecution of all persons who commit acts of battery or extreme cruelty against immigrant women and children. *Id.* at §§ 2a(1)(2), 2b(1)(2)(3).

[306] Demetrious G. Papademetriou, T. Alexander Aleinikoff, and Deborah Waller Meyers, *Reorganizing the Immigration Function: Toward a New Framework for Accountability* (Washington, DC: Carnegie Endowment for International Peace, 1998), pp. 21–29; American Immigration Lawyers Association, *Agency in Meltdown: Major Problems Continue with INS Adjudication of Benefits for Immigrants*, June 6, 2000, accessed at <http://www.aila.org/newsroom/39ad9002.html>.

[307] NCLR, *The Mainstreaming of Hate*, p. 43.

[308] Papademetriou et al., *Reorganizing the Immigration Function*, pp. 22–23.

[309] Ibid., p. 23.

[310] Dewar, "Senate Poised to Expand Visas"; William Branigin, "INS Given High Marks in Naturalization Audit, Citizenship Process Improved, but Backlog Grows," *The Washington Post*, Dec. 17, 1997, p. A23; Papademetriou et al., *Reorganizing the Immigration Function*, p. 26.

[311] William Branigin and Kathryn Wexler, "INS Unveils Plan to Speed Naturalization Process," *The Washington Post*, Sept. 1, 1995, p. A1.

[312] *See* U.S. Department of Justice, Office of the Inspector General, *An Investigation of the Immigration and Naturalization Service's Citizenship USA Initiative*, Executive Summary, accessed at <http://www.usdoj.gov/oig/cusarpt/cusaexec.htm. The program was accused of several violations ranging from reliance on inaccurate background checks to the program being implemented for inappropriate political ends. However, only some of these charges were found to have merit. Ibid.

changed several of its procedures, ultimately slowing down its application processing time.[313]

Between 1999 and 2000, processing time for applications for permanent residency had increased to almost three years, and the backlog of applications for green cards was close to one million.[314] Further, the backlog of citizenship requests was over two million, and the waiting time was more than two years.[315] By November 2000, however, the wait for citizenship requests to be processed had declined to less than nine months, and the backlog had declined to 800,000.[316] Nonetheless, delays in INS application processing have had a profound effect on immigrants' ability to obtain employment, education, and social services.[317]

Overall, the Clinton administration appears to have made little difference in the plight of immigrants. Current federal civil rights enforcement efforts fall short of combating the increased incidence of discrimination and violence against ethnic minorities, and INS' deficiencies in processing citizenship applications have hindered immigrants' ability to gain employment or receive certain benefits. In short, U.S. immigration policy does not adequately protect immigrant rights, and the denial of public benefits under the new legislation is causing hardship for legal immigrants.[318]

Voting Rights

"Over the past thirty years, the protection of voting rights, and the resulting increase in the number of minority representatives in Congress, has been a testament to our enduring democracy. Now, it is increasingly clear that a direct attack is being mounted on electoral districts that contain African-American or Hispanic population majorities. In the face of this attack, the position of this administration is clear: We are committed to the gains made by minority voters through enforcement of the Voting Rights Act."[319]

—President Clinton, July 27, 1994

President Clinton signed the National Voter Registration Act in 1993.[320] With this law, Congress acknowledged that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for federal office and disproportionately harm voter participation by various groups, including racial minorities."[321] As such, the purpose of the law is:

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; (3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained.[322]

Overall, the purpose of the National Voter Registration Act, also known as the "Motor Voter Act," is to increase voter registration throughout the country and reverse the effects of discriminatory and unfair voter registration laws. Therefore, the law allows for a variety of mechanisms

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[313] William Branigin, "Nation Receives 18,500 Citizens For Its Birthday, Record INS Backlog Holds 2 Million," *The Washington Post*, July 5, 1998, p. A3; American Immigration Lawyers Association, "Naturalization Needs to Serve Eligible People," Oct. 8, 1999, accessed at <http://www.aila.org/newsroom/34gr8052.html>.

[314] Mae M. Cheng, "Immigrants' Status in Limbo/Backlog of Residency Applications at INS," *Newsday*, Jan. 6, 2000, p. A27; Martin Mbugua, "Green Card Delays Put the Heat on INS, 3-yr. Process faulted," *The New York Daily News*, Jan. 7, 2000, Suburban section, p. 35.

[315] Ibid.

[316] Dan Eggen, "Meissner Ends Embattled Tenure as Head of INS, Immigration Wave Tested Her Reshaping of Agency," *The Washington Post*, Nov. 20, 2000, p. A19; "Immigrants Trapped in Backlog of Applications May See Relief," *The Oakland Post*, May 31, 2000, p. A9. *See* U.S. Department of Justice, Immigration and Naturalization Service, *Monthly Statistical Report: September 2000 FY Year End Report*, Oct. 31, 2000, accessed at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/msrsep00/natz.htm>.

[317] *See* Joe Pappalardo, "The Americanized culture of undocumented immigrants finds the doors to higher education closed," *The Dallas Observer*, June 1, 2000, Features section; Cindy Gonzalez, "INS Moves Too Slowly for Widowed Immigrant, the Pace of INS Paperwork," *The Omaha World-Herald*, Oct. 22, 2000, p. 1A; Mbugua, "Green Card Delays Put the Heat on INS."

[318] *See* DeLaet, *U.S. Immigration Policy in an Age of Rights*, pp. 114–15.

[319] The White House, Office of the Press Secretary, "Statement by the President [on voting rights]," July 27, 1994, accessed at <http://clinton6.nara.gov/1994/07/1994-07-27-president-on-voting-rights-act.html>.

[320] Pub. L. No. 103-31, § 2, 107 Stat. 77 (codified at 42 U.S.C. § 1973gg (1994)).

[321] 42 U.S.C. § 1973gg(a)(3).

[322] *Id.* at § 1973gg(b).

to assist citizens in registering to vote, including simultaneous application for both drivers' licenses and voter registration. The act also allows for mail-in registration.[323]

In 1994, Clinton made a statement addressing legal challenges to congressional voting districts. The President stated:

> At my instruction, Attorney General Janet Reno and Assistant Attorney General for Civil Rights Deval L. Patrick are vigorously defending the Congressional districts that are currently being challenged. . . . Under the leadership of Deval Patrick, the Justice Department's Civil Rights Division is working hard to ensure that the Constitution has meaning for minority voters by making the case that these districts stay intact. I agree wholeheartedly that he should have all the resources necessary for that work.
>
> In the short-term, the fate of minority voting rights is in the courts. In the long-term, if necessary, I will work with Attorney General Reno and Members of Congress to enact legislation to clarify and reinforce the protections of the Voting Rights Act. Inclusion of all Americans in the political process is not a luxury; it is central to our future as the world's most vibrant democracy.[324]

The challenges to which the President alluded included the case *Shaw v. Reno* in which it was alleged that a reapportionment statute would result in segregating voters into two different districts on the basis of race.[325] At issue was whether it was legal to create a "majority-minority" district. In other words, redistricting plans in which minorities made up the majority of voters were under attack as being illegal, despite that such redistricting is authorized under the Voting Rights Act of 1965 and is approved by the Department of Justice. Under the Voting Rights Act, DOJ is authorized to approve new voting procedures and redistricting plans, bring lawsuits to remedy discrimination in elections conducted in all jurisdictions, and commence a civil action against any state or political subdivision that has imposed or applied a discriminatory device or procedure.[326]

In *Shaw v. Reno*, the Supreme Court decided that if a state redistricting plan appears to have no rational explanation except to separate voters on the basis of race, a plaintiff has a claim under the equal protection clause.[327] Similar decisions were reached in *Holder v. Hall*[328] and *Miller v. Johnson*.[329] In fact, there has been extensive litigation concerning redistricting in the wake of the 1990 census. In 1999, for example, the Supreme Court reaffirmed in *Hunt v. Cromartie*[330] that "all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be scrutinized."[331] Further, in *Reno v. Bossier Parish School Board*,[332] the Court limited DOJ's preclearance authority to situations in which a voting change would make minority voters worse off than before.[333] However, the Court upheld the decision to grant preclearance of a redistricting plan "even though the plan was enacted with a discriminatory but nonretrogressive purpose."[334]

According to the Citizens' Commission on Civil Rights, these decisions have clarified the criteria for creating majority-minority voting districts.[335] According to the commission's 1999 report, "[t]hrough these decisions, the Supreme Court has made a definitive statement that the Voting Rights Act is still valid, and that there is a compelling justification for creating majority-minority districts to remedy violations under the

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[323] CCCR, *New Challenges: The Civil Rights Record of the Clinton Administration Mid-Term*, 1995, p. 178.

[324] The White House, Office of the Press Secretary, "Statement by the President [on voting rights]."

[325] 509 U.S. 630 (1993).

[326] 42 U.S.C. §§ 1973c, 1973j(d), 1973aa-2 (1994). *See also* U.S. Department of Justice, Civil Rights Division, Voting Rights Section, "About Section 5 of the Voting Rights Act," accessed at <http://www.usdoj.gov/crt/voting/sec_5/about.htm>.

[327] 509 U.S. at 642–43. *See* Miller v. Johnson, 515 U.S. 900, 903 (1995). *See* "Equal Justice Under the Law; America's Next President to Shape Civil Rights," *Fulton County Daily Report*, American Lawyer Media, L.P., Mar. 1, 2000. *See also* American Civil Liberties Union, "Reaffirmation or Requiem for the Voting Rights Act? The Court Will Decide," 1996, accessed at <http://www.aclu.org/issues/racial/racevote.html>.

[328] 512 U.S. 874 (1994).

[329] 515 U.S. 900 (1995).

[330] 526 U.S. 541 (1999).

[331] *Id.* at 546; *see also* "Equal Justice Under the Law."

[332] 528 U.S. 320 (2000).

[333] *Id.* at 340–41. *See* "Equal Justice Under the Law."

[334] 528 U.S. at 340–41.

[335] Todd A. Cox, "Enforcing Voting Rights in the Clinton Administration As We Approach the New Millennium," chap. IX in CCCR, *The Test of Our Progress*.

Act."[336] Although redistricting plans were declared unconstitutional in several of these cases,[337] the Court upheld the need for the creation of majority-minority districts:

> So long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. . . . Only if traditional districting criteria are neglected and that neglect is predominantly due to the misuse of race does strict scrutiny apply.
>
> Second, where voting is racially polarized, § 2 prohibits States from adopting districting schemes that would have the effect that minority voters "have less opportunity than other members of the electorate to . . . elect representatives of their choice." § 2(b). That principle may require a State to create a majority-minority district where the three *Gingles* factors are present[:] (i) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," (ii) "it is politically cohesive," and (iii) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," Thornburg v. Gingles, 478 U.S. at 50–51.[338]

As the nation awaits the release of estimates from the 2000 census, issues concerning redistricting mostly likely will again be questioned in the courts. As the Citizens' Commission on Civil Rights stated in its 1999 report:

> As the next century approaches, the voting rights of the nation's minorities are at an important crossroads. At the beginning of the first Clinton Administration, lawsuits challenging redistricting plans that contained minority-opportunity districts (i.e., districts providing minorities an equal opportunity to elect candidates of their choice) threatened to eliminate the electoral gains won following the 1990 redistricting. As the first half of the second Clinton Administration draws to a close, there are continued threats to minority voting rights from new *Shaw* challenges as well as new questions raised in the enforcement of both the Voting Rights Act of 1965 and the National Voter Registration Act of 1993. The Administration will have to be proactive in its law enforcement and creative in developing responses to the challenges that have become inevitable in enforcing voting rights laws. Depending on the enforcement strategies implemented by the Administration, minority electoral gains will either be protected or suffer severely as we near the next century and the next redistricting cycle.[339]

The Commission commends the Clinton administration for its efforts to uphold redistricting plans that ensure minority voting rights. Nonetheless, DOJ must be more proactive in its efforts to enforce the Voting Rights Act of 1965 and related statutes. Indeed, the November 2000 election shed light on the fact that there are "serious flaws in the mechanics of voting."[340] During his final days in office, President Clinton urged the nation to investigate allegations of voter intimidation and discrimination fully and to "take aggressive steps to improve voter turnout, and modernize and restore confidence in our voting system."[341]

Administration of Justice with Regard to Sex, Race, and Ethnicity

Congress passed the Violent Crime Control and Law Enforcement Act in 1994[342] with President Clinton's support. Among other things, this law expanded coverage of the Hate Crime Statistics Act to include crimes based on disability and included the Violence Against Women Act and the Hate Crime Sentencing Enforcement Act, which requires the U.S. Sentencing Commission to increase penalties for hate crimes.[343]

The law also made reality President Clinton's promise to place 100,000 additional police officers in America's communities.[344] The law au-

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[336] Ibid., pp. 109–10.

[337] *See, e.g.*, Bush v. Vera, 517 U.S. 952 (1995) (deciding that "[e]ach of three congressional districts established, under Texas legislature's redistricting plan, with African-American or Hispanic majority held to violate the Federal Constitution's Fourteenth Amendment as racial gerrymander").

[338] 517 U.S. at 993–94. *See* Cox, "Enforcing Voting Rights in the Clinton Administration," p. 110.

[339] Cox, "Enforcing Voting Rights in the Clinton Administration," p. 109.

[340] Clinton, "Message to Congress: The Unfinished Work of Building One America."

[341] Ibid. The U.S. Commission on Civil Rights also is conducting hearings on voting irregularities.

[342] Pub. L. No. 103-322, 109 Stat. 2096 (codified at 28 U.S.C. §§ 280–283 (1994)).

[343] The Department of Justice's Civil Rights Division is responsible for enforcing the hate crimes law, and the Attorney General (through the Federal Bureau of Investigation) is required to collect data about crimes that manifest evidence of prejudice. *See* Hate Crime Statistics Act, 28 U.S.C. § 534 note.

[344] U.S. Department of Justice, Community Oriented Policing Services (COPS), "Legislative History," accessed at

thorized $8.8 billion over six years for grants to law enforcement agencies for community-policing officers and to advance the concept of community policing.[345] In 1994, DOJ's Office of Community Oriented Policing Services began operations with the mission of promoting community policing and implementing the directive to increase the number of police officers nationwide by 100,000.[346]

With this new focus on law enforcement, the Clinton administration addressed several issues related to the administration of justice with regard to race, sex, and ethnicity. In particular, the administration launched new programs to address illegal drug use, racial profiling, hate crimes, police brutality, and domestic violence. Some of the Clinton administration's policies and programs in these areas were positive; others, however, had little effect or even resulted in eroding the civil rights protections of thousands of minorities.

The War on Drugs

President Clinton elevated the "drug czar" position to the cabinet level and continued the nation's commitment to reduce illegal drug use through law enforcement, prevention, treatment, interdiction, and international efforts.[347] During the Clinton presidency, several laws and programs were enacted aimed at combating illegal drug use, including community-oriented programs and minimum sentencing requirements. However, several of the policies have come under attack as having a disproportionate effect on minorities.[348] For example, penalties for crack cocaine use are much more severe than those for powered cocaine. Yet, powdered cocaine is more likely to be used by wealthier, white consumers, compared with crack. Thus, minorities are targeted for drug arrests and face harsher punishments than whites.[349]

Many argue that the nation's anti-drug policies focus only on low-level dealers and addicts—those who need treatment and rehabilitation as opposed to incarceration with hardened criminals.[350] Opponents of such policies argue that the drug kingpins are not apprehended or get a lighter sentence by revealing their dealers and customers.[351] Others have argued that policing is heavier in minority and low-income communities, resulting in arrest and sentencing disparities.[352] Still others charge that the war on drugs has lead to racial profiling as police officers use suspicion of drugs as a pretext for targeting African Americans.[353]

Indeed, recent statistics show racial and ethnic disparities in the number of persons serving sentences for drug-related arrests. Between 1990 and 1999, drug offenses accounted for 25 percent of the growth in the number of black inmates and 18 percent of the growth in the number of Hispanic inmates. Comparatively, drug offenses accounted for only 12 percent of the growth in the number of white inmates.[354] In 1998, 134,800 African Americans were imprisoned under state laws for drug offenses, representing almost 57 percent of all persons sentenced for drug offenses. Whites accounted for just under 20 percent of the persons serving sentences for drug offenses. About 22 percent of the drug offenders in prison are Hispanic.[355]

<http://www.usdoj.gov:80/cops/news_info/legislate/leg_history.htm>.

[345] Ibid. Community-oriented policing is defined as "proactive, solution-based, and community driven." In involves police departments and communities working together to prevent crime, arrest offenders, and solve problems. COPS, "A Definition of Community Policing," accessed at <http://www.usdoj.gov:80/cops/news_info/bg_info/bg_definition.htm>.

[346] COPS, "Legislative History."

[347] The White House, Office of the Press Secretary, "Signing of the Drug-Free Communities Act of 1997," June 27, 1997, accessed at <http://www.clinton6.nara.gov>.

[348] Duncan Campbell, "Race for the White House: Disenfranchisement: It's divine justice, Gore is told; Drugs policy denied vote to 2m blacks," *The Guardian* (London), Nov. 14, 2000, p. 4.

[349] Stephen Koff, "Drug War Found Harshest for Blacks," *The Plain Dealer*, June 8, 2000, p. 19A; Lou Marano, "Commentary: Lonely Fighters for Justice," United Press International, Jan. 6, 2001; Neal R. Pierce, "Two Million: Couldn't We Do Better?" *The San Diego Union-Tribune*, Feb. 7, 2000, p. B6.

[350] Betty Winston Baye, "War on Drugs Hinders Health Care: Why were some of the women taken from their hospital beds still bleeding from delivery?" *The Des Moines Register*, Oct. 24, 2000, p. 7.

[351] Marano, "Commentary: Lonely Fighters for Justice"; Melba Newsome, "Hard Time," *Essence*, September 2000, p. 146.

[352] Koff, "Drug War Found Harshest for Blacks."

[353] Baye, "War on Drugs Hinders Health Care."

[354] U.S. Department of Justice, Office of Justice Programs, "Prisoners in 1999," *Bureau of Justice Statistics Bulletin*, NCJ 183476, August 2000, p. 11.

[355] Ibid., p. 10.

Racial Profiling

"We must work together to build the trust of all Americans in law enforcement. We have great confidence in our Federal law enforcement officers and know that they strive to uphold the best principles of law enforcement in our democratic society. We cannot tolerate, however, officers who cross the line and abuse their position by mistreating law-abiding individuals or who bring their own racial bias to the job. No person should be subject to excessive force, and no person should be targeted by law enforcement because of the color of his or her skin."

—President Clinton, Memorandum on Fairness in Law Enforcement, June 1999

The Traffic Stops Statistics Study Act was introduced in Congress in 1999.[356] The law would require DOJ to conduct an initial nationwide study of traffic stops and subsequently collect data on traffic stops from a nationwide sample of jurisdictions. The data would identify, among other things: (1) the purpose of the stop, or alleged infraction; (2) the race, ethnicity, gender, and age of the driver; (3) whether immigration status was questioned; and (4) the number of individuals in the stopped vehicle.[357]

In June 1999, President Clinton issued a memorandum to the Secretary of the Treasury, the Attorney General, and the Secretary of the Interior concerning the collection of data on racial profiling by law enforcement officers.[358] In the memorandum, the President stated, "Stopping or searching individuals on the basis of race is not effective law enforcement policy, and it is not consistent with our democratic ideals, especially our commitment to equal protection under the law for all persons. . . . It is simply wrong."[359] To address the issue of racial profiling, the President directed the Department of the Treasury, the Department of Justice, and the Department of the Interior to collect statistics relating to race, ethnicity, and gender for their law enforcement activities.[360] The agencies complied with the memorandum by submitting their proposals for data collection and pilot programs within 120 days of the President's request.[361] The DOJ proposal indicates that by May 31, 2001, the Attorney General will prepare a report to the President summarizing the data collected. Interim reports are expected.[362]

State and local law enforcement agencies have begun to respond to citizens' concerns about racial profiling, but the issue is far from resolved.[363] Although President Clinton and DOJ have focused on federal law enforcement, little has been done to address racial profiling at the state and local levels, and a stronger federal effort is needed, including passage of a law banning racial profiling. Further, data on racial profiling in the federal government should be issued sooner rather than later, and guidance on the prohibition of racial profiling should be developed.

Hate Crimes

On June 28, 2000, the Department of Justice sponsored a Hate Crimes Summit in Washington, D.C., which brought together about 300 Immigration and Naturalization Service officers, Secret Service, District and suburban police, and security guards from local colleges.[364] The presentation addressed identifiable clues that might be signs of a hate crime, such as swastikas, graffiti, hateful speeches or literature, the race of the victim and perpetrator, hate symbols on property, and the absence of any other motive. The presentation also focused on the challenges in making the determination of whether a given crime could be characterized as a "hate crime." A

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356 H.R. 1443, 106th Cong. (1999); S. 821, 106th Cong. (1999).

357 H.R. 1443, § 2(a)(3); S. 821, § 2(a)(3).

358 William J. Clinton, Memorandum to the Secretary of the Treasury, the Attorney General, and the Secretary of the Interior, re: Fairness in Law Enforcement: Collection of Data, June 9, 1999, accessed at <http://clinton6.nara.gov/1999/06/1999-06-09-memorandum-on-fairness-in-law-enforcement.html>.

359 Ibid.

360 Ibid.

361 *See* U.S. Department of Justice, "Proposal: Responding to the Executive Memorandum on Fairness in Law Enforcement," Oct. 14, 1999, accessed at <http://www.ojp.usdoj.gov/bjs/pub/ascii/remflexm.txt>.

362 Ibid.

363 *See, e.g.*, David B. Mitchell, superintendent, Maryland State Police, "Racism Isn't in the Profile of the Maryland State Police," letter to the editor, *The Baltimore Sun*, July 29, 2000, accessed at <http://www.inform.umd.edu/UMS+State/MD_Resources/MDSP/articleDBM.html>; State of New Jersey, Department of Law and Public Safety, Office of the Attorney General, *First Seminannual Public Report of Aggregate Data Submitted Pursuant to the Consent Decree Entered Into by the United States of America and The State of New Jersey Division of State Police*, June 2000.

364 Stacey Pamela Patton, "Hate Crime Clues Shared at Summit," *The Washington Post*, June 29, 2000, p. A5.

key indicator for law enforcement professionals, according to the presentation, is the presence of "bias hate."[365]

The DOJ summits and ones like it are part of a nationwide initiative in response to high-profile, hate-related incidents, such as the murders of James Byrd and Matthew Sheppard. However, as the DOJ summit presentation stressed, the high-profile cases are but a small number of the many hate crimes reported each year. How these crimes will be addressed by the federal government is therefore a crucial matter. Despite the strong support of the Clinton administration, efforts to expand hate crimes legislation at the national level have thus far remained unsuccessful in Congress.

In August 2000, two bills were pending in Congress that would amend the federal hate crimes law.[366] These bills would add offenses motivated by sexual orientation, gender, or disability to the existing federal law, which would allow the federal government to prosecute these offenders.[367] It also would make it consistent with the definition of hate crime under the Violent Crime Control and Law Enforcement Act of 1994.[368] Further, the two bills require the Federal Sentencing Commission to study the issue of adults recruiting juveniles to commit hate crimes and would amend the federal sentencing guidelines to ensure consistency with other federal sentencing guidelines regarding the use of juveniles to commit hate crimes. Another bill, the Hate Crime Statistics Improvement Act,[369] was introduced in April 2000. However, when the hate crimes legislation was removed from the Department of Defense Authorization bill in October 2000, the President charged that Republican leaders had "made a serious mistake" and had "turned their backs on legislation designed to send the message that all persons should be treated the same under the law—no matter what their race, color, religion, sex, national origin, sexual orientation, or disability."[370]

In a memorandum to the Attorney General in September 2000, President Clinton directed the Department of Justice to work with state and local law enforcement agencies to develop a plan to improve hate crimes reporting.[371] This directive was issued following the release of a DOJ report finding that 83 percent of the jurisdictions participating in the FBI's Uniform Crime Report had reported no hate crimes.[372] In his memorandum, the President suggested that the DOJ plan include such actions as pilot programs in jurisdictions where law enforcement agencies reported no hate crimes as well as training sessions conducted by federal law enforcement on identifying hate crimes.[373]

The Commission commends the Clinton administration and the Department of Justice for their efforts to address hate crimes. While some of these efforts have been recent, others have been ongoing, particularly since the passage of the Violent Crime Control and Law Enforcement Act in 1994.

Police Misconduct

The Clinton administration has presided over a profoundly complex and often troubling period in the state of police-community relations in this country. Throughout the 1990s, there were persistent reports of police misconduct in the nation's largest and most diverse metropolitan areas.[374] The FBI and DOJ receive approximately 10,000 complaints of police misconduct every year, most of which involve allegations of physi-

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[365] Ibid.

[366] Two of the bills, H.R. 1082 and S. 622, were introduced during the 1st Session of the 106th Congress and are cited as the Hate Crimes Prevention Act of 1999. The original House bill (H.R. 77), which was introduced by Congresswoman Sheila Jackson-Lee of Texas in January 1999, was referred to the House Committee on the Judiciary. H.R. 1082 is the bill that came out of that committee. In June, the Senate version, S. 622, was passed.

[367] 28 U.S.C. § 245 (2000). *See also* "Justice Officials Meet With Mississippi Teen's Family," *The Washington Post*, July 13, 2000, p. A13.

[368] *See* chap. 2, p. 9 for a definition of hate crime.

[369] H.R. 4317, 106th Cong. (2000).

[370] The White House, Office of the Press Secretary, "Statement by the President [on hate crimes legislation]," Oct. 5, 2000, accessed at <http://clinton6.nara.gov/2000/10/2000-10-05-statement-by-the-president-on-hate-crimes-legislation.html>.

[371] William J. Clinton, Memorandum for the Attorney General, re: Improving Hate Crimes Reporting, Sept. 13, 2000, accessed at <http://clinton6.nara.gov/2000/09/2000/09/13-memorandum-from-president-on-improving-hate-crimes.reporting.html>.

[372] *See* U.S. Department of Justice, *Improving the Quality and Accuracy of Bias Crime Statistics Nationally: An Assessment of the First Ten Years of Bias Crime Data Collection*, September 2000.

[373] Clinton, Memorandum for the Attorney General, re: Improving Hate Crimes Reporting.

[374] *See* chap. 2, pp. 9–10.

cal abuse that results in injuries and death.[375] In many cases, it appears these incidents have been motivated by racial and other forms of illegal bias.

During the 1990s, the U.S. Commission on Civil Rights undertook extensive efforts to document racial and ethnic tensions in the nation's large metropolitan areas and rural communities.[376] Police practices, including numerous instances of well-documented police misconduct, figured prominently in this multi-report study based on hearings held in several areas across the country. Testimony at the hearings indicates the scope and nature of the concerns relating to civil rights in the context of police practices and police-community relations in the various regions on which the Commission focused. Those who testified before the Commission at its 1999 New York hearing noted that a disproportionately high number of African Americans and Latinos were filing complaints of police misconduct with the New York Police Department's Civilian Complaint Review Board.[377] White officers were often the subject of the allegations.[378] The testimony of witnesses at the Commission's New York hearing indicated several factors contributing to police misconduct, including racism, a lack of discipline for recalcitrant officers, and little incentive to protect civilians' rights.[379]

The Clinton administration played a key role in efforts to combat police misconduct during the 1990s, including supporting the Violent Crime Control and Law Enforcement Act.[380] This legislation was designed, in part, to ensure against police misconduct, including discrimination in violation of constitutional rights and federal civil rights laws, and to provide legal remedies for victims of such discrimination. Under Section 14141 of the act:

> It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.[381]

The act authorizes the Attorney General to file lawsuits seeking court orders to reform police departments engaging in a pattern or practice of violating citizens' federal rights.[382] In addition, the antidiscrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968 and Title VI of the Civil Rights Act of 1964 both prohibit discrimination based on race, color, sex or national origin by police departments receiving federal funds.[383]

The Attorney General delegated the act's police misconduct authority to DOJ's Special Litigation Section. Section staff investigate police departments by interviewing police officials and witnesses of alleged wrongdoing, reviewing numerous records, and evaluating departmental practices. Staff members work with experts who assist with evaluating investigative material and developing remedies to address deficiencies.[384]

The Section has obtained significant relief under its police misconduct authority. For example, in 1997, it obtained two consent decrees to remedy systemic misconduct in municipal police departments in Pittsburgh, Pennsylvania,

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[375] U.S. Department of Justice, Federal Bureau of Investigation, "Color of Law/Police Misconduct," accessed at <http://www.fbi.gov/programs/civilrights/colorlow.htm>.

[376] Between 1993 and 1999, the U.S. Commission on Civil Rights issued reports in this series on Washington, DC, Chicago, Miami, Los Angeles, and New York City. In addition, on May 24–26, 1999, the Commission held a hearing in Manhattan devoted solely to police practices and civil rights in New York City and issued a report on this hearing in August 2000. *See* USCCR, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination*, vols. I–V; USCCR, *Police Practices and Civil Rights in New York City*, August 2000.

[377] USCCR, *Police Practices and Civil Rights in New York City*, p. 55 (citing testimony of Norman Siegel, executive director of the New York Civil Liberties Union, and testimony of Sergeant Anthony Miranda, president of the Latino Officers Association, U.S. Commission on Civil Rights, hearing, New York, NY, May 26, 1999, transcript, pp. 29, 100–01). Complaints of misconduct include such acts as use of force (such as unnecessary beatings), abuse of authority, discourtesy, and offensive language. *See* ibid., p. 53.

[378] Ibid., pp. 6, 55.

[379] Ibid., pp. 54–55.

[380] Pub. L. No. 103-322, 109 Stat. 2096 (codified at 28 U.S.C. §§ 280–283).

[381] 42 U.S.C. § 14141(a) (2000).

[382] *Id.*

[383] U.S. Department of Justice, Civil Rights Division, Special Litigation Section, "Conduct of Law Enforcement Agencies," Nov. 13, 2000, accessed at <http://www.usdoj.gov/crt/split/police.htm>.

[384] Ibid.

and Steubenville, Ohio.[385] The decrees require the departments to implement widespread reforms, including training, supervising, and disciplining officers, and implement systems to receive, investigate, and respond to complaints of misconduct. The decrees have had a widespread impact and are being used as models by other police departments.[386] The Section is investigating other systemic problems in law enforcement agencies, such as excessive force; false arrest; discriminatory harassment, stops, searches, or arrests; and retaliation against persons alleging misconduct.[387]

In addition, the Special Litigation Section is an integral part of the Civil Rights Division's Police Misconduct Initiative, along with representatives from various sections in the division, the Office of Justice Programs, and the FBI.[388] The chief of the Special Litigation Section serves as co-chair for civil enforcement of the initiative, a position created at the Attorney General's request to coordinate departmentwide enforcement efforts to combat police misconduct. The initiative is a multifaceted program for addressing the pressing issues of police integrity and accountability that face our country.[389] According to DOJ, a focal point of these efforts has been a series of problem-solving meetings sponsored by the department that are enhancing discussion and promoting progress toward the formulation of strategies and "model practices" for addressing a wide range of police accountability issues.[390]

The department's efforts to address police brutality are a good example of the Clinton administration's support for and willingness to experiment with innovative, proactive policy initiatives to address civil rights issues.

[385] Ibid.

[386] Ibid.

[387] Ibid.

[388] Ibid.

[389] Bill Lann Lee, Acting Assistance Attorney General, Civil Rights Division, U.S. Department of Justice "Pattern or Practice of Police Misconduct Program," June 2000, accessed at <http://www.usdoj.gov/crt/split/pppmp.htm>.

[390] Ibid.

Disparities in Capital Punishment

"Whether one supports the death penalty or opposes it, there should be no question that the gravity and finality of the penalty demand that we be certain that when it is imposed, it is imposed fairly."

—President Clinton, December 2000

The Clinton administration's record with regard to racial and ethnic disparities in capital punishment was decidedly mixed. On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act into law.[391] The act limits the number of appeals by prisoners who are on death row by changing habeas corpus procedures. It seeks to curb terrorist attacks by preventing terrorist groups from raising money, requiring identification "taggants" to be placed in plastic explosives, allowing quick deportations of alien terrorists, and requiring mandatory victim restitution for terror crimes.[392]

President Clinton firmly supported the law. He urged congressional Democrats to limit the number of amendments to the act in order to ensure that it quickly passed through Congress in time to be signed on the one-year anniversary of the Oklahoma City bombing.[393] The Antiterrorism and Effective Death Penalty Act was debated during the time of Clinton's campaign for re-election against Senate Majority Leader Robert Dole, so Clinton used his advocacy of the act to show that his status as a Democrat did not prevent him from being hard on crime and terrorism.[394]

However, the President drew sharp criticism for his advocacy of the Antiterrorism and Effective Death Penalty Act. Opponents of the death penalty charged that limiting the appeals of death row inmates would cause more innocent people to be wrongly executed.[395] The act has required immigration officials to detain and deport legal aliens who have been convicted of a

[391] Patrick Lackey, "Executions Speed Up Justice, but without the Human Rights," *The Virginian-Pilot*, Sept. 5, 1996.

[392] "Anti-terrorism Law Expected to Pass This Week," *The Pittsburgh Post-Gazette*, Apr. 16, 1996.

[393] Robert Green, "Clinton and Dole Urge Swift Approval of Anti-Terrorism Bill," *The Chicago Sun-Times*, June 6, 1995.

[394] David Carrithers, "Crime issue plays a pivotal role in election," *The Chattanooga Times*, Oct. 31, 1996.

[395] Patrick Lackey, "Executions Speed Up Justice, but without the Human Rights."

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crime, no matter how long ago or how serious. This new provision caused hundreds of long-term legal residents to be arrested. In response to the uproar over these measures, President Clinton stated, "This bill also makes a number of major ill-advised changes in our immigration laws having nothing to do with fighting terrorism."[396] Clinton urged Congress to correct certain sections of the Antiterrorism and Effective Death Penalty Act in order to combat terrorism without restricting the rights of America's immigrant population.

In September 2000, the Department of Justice issued a report on the federal death penalty system, providing information on disparities in capital punishment and changes in the federal death penalty system over the years.[397] The report describes the new decision-making policy adopted in 1995. This policy is commonly known as the death penalty protocol. The 1995 protocol required U.S. attorneys to submit for review all cases in which a defendant is charged with a capital-eligible offense, whether or not they are seeking the death penalty.[398] The new policy requires that a review committee make an independent recommendation to the Attorney General on whether any case should be considered for the death penalty or not. The Attorney General reviews the recommendations from the review committee and U.S. attorneys, and the underlying case materials including materials from the defense counsel.[399] However, with the new protocol in place, the rate of agreement between the Attorney General and the U.S. attorneys did not substantially change.[400] Nonetheless, the statistics presented in the report suggest there are disparities in the decisions concerning whether or not to seek the death penalty.

On December 7, 2000, President Clinton announced that he had decided to stay the execution of Juan Raul Garza for six months to allow the Department of Justice appropriate time to collect and analyze information on disparities in the federal death penalty system.[401] The President directed the Attorney General to prepare a report by the end of April 2001 on racial and geographic disparities in federal death penalty prosecutions. A detailed analysis of this issue is required to determine whether such disparities are the result of bias and discrimination within the system.[402]

Until recently, insufficient federal attention has been paid to the issue of sentencing disparities. During the 106th Congress, bills were introduced to address justice, fairness, and due process with regard to the death penalty.[403] These bills propose a moratorium on the imposition of the death penalty at the federal and state levels until an in-depth study of such issues as racial and geographic disparities can be completed.

Domestic Violence

"Domestic violence transcends all ethnic, racial, and socioeconomic boundaries. Its perpetrators abuse their victims both physically and mentally, and the effects of their attacks are far-reaching—weakening the very core of our communities. Domestic violence is particularly devastating because it so often occurs in the privacy of the home, meant to be a place of shelter and security. During the month of October, all Americans should contemplate the scars that domestic violence leaves on our society and what each of us can do to prevent it."[404]

—President Clinton, Proclamation for National Domestic Violence Awareness Month, 2000

In 1994, the Violence Against Women Act (VAWA) was passed.[405] Among other things, this law provides grant money for research, safety

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[396] Lena Williams, "Terror Law Casts Its Net Unsparingly," *The International Herald Tribune*, July 18, 1996.

[397] DOJ, *The Federal Death Penalty System: A Statistical Survey (1988–2000)*, Sept. 12, 2000, p. 2.

[398] Ibid., pp. 2, 9.

[399] Ibid., p. 23.

[400] Ibid., p. 41.

[401] The White House, Office of the Press Secretary, "Statement by the President: Staying of the Execution of Juan Raul Garza," Dec. 7, 2000, accessed at <http://clinton.nara.gov>.

[402] Ibid.

[403] Federal Death Penalty Moratorium Act, H.R. 5236, 106th Cong. (2000); Federal Death Penalty Moratorium Act, S. 3048, 106th Cong. (2000); National Death Penalty Moratorium Act, H.R. 5237, 106th Cong. (2000); National Death Penalty Moratorium Act, S. 2463, 106th Cong. (2000).

[404] The White House, Office of the Press Secretary, National Domestic Violence Awareness Month, 2000, Proclamation by the President of the United States of America, Oct. 2, 2000, accessed at <http://clinton6.nara.gov/2000/09/2000-09-29-proclamation-on-national-domestic-violence-awareness-month.html>.

[405] Pub. L. No. 193-322, Title IV, 198 Stat 1902 (codified at 42 U.S.C. § 13891 (1994)).

programs, shelters, and the national domestic violence hotline.[406] Since the passage of the VAWA, there has been increased attention to gender-motivated crimes and physical and emotional abuse of women. The Department of Justice established the Violence Against Women Office and the National Domestic Violence Hotline.[407] DOJ also has begun publishing detailed statistics on the incidence of domestic violence in the United States.[408] In addition, the Department of Health and Human Services included violence against women as an important issue in its Healthy People Initiative.[409]

The National Advisory Council on Violence Against Women was created in 1995.[410] Chaired by the Attorney General and the Secretary of Health and Human Services, the 46-member council released a report in October 2000 that proposes the following steps to combat domestic violence and abuse:

- ensure that all women experiencing violence have a place to turn;
- enhance the health and mental health care systems' response to violence against women;
- provide equal and safe access to the justice system and the protections it affords;
- increase women's access to meaningful economic options;
- invest in prevention and early intervention with children and youth; and
- identify and eliminate social norms that condone violence against women.[411]

According to the council, this agenda "is a call to mobilize action so all women and their families can live free from the fear of violence."[412]

In 1998, the President issued a memorandum to the Secretary of State, the Attorney General, the administrator of the Agency for International Development, and the director of the U.S. Information Agency concerning efforts to combat violence against women and the unlawful trafficking in women and girls.[413] Among other things, the memorandum directs the Secretary of State in coordination with the administrator of the Agency for International Development to expand their efforts to combat violence against women around the world. It also directs the Interagency Council on Women to coordinate the federal government's response to trafficking of women and girls.[414] In addition, the memorandum directs the agencies to expand public awareness campaigns, ensure safety for victims and witnesses, and assist other countries in developing legislation and other programs to combat violence and trafficking of women and girls.[415]

The Clinton administration also supported the reauthorization of the VAWA, which was set to expire on September 30, 2000. However, it took almost another month for the reauthorization bill to be signed. Although the House passed the reauthorization bill, it still had not been passed by the Senate.[416] Reauthorization of the act was strongly encouraged by the Clinton administration. Both the President and Vice President released statements supporting the act.[417]

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[406] 42 U.S.C. § 13891 (1994).

[407] *See* U.S. Department of Justice, Office of Justice Programs, Violence Against Women Office, "About the Violence Against Women Office," accessed at <http://www.ojp.usdoj.gov/vawo/about.htm>. The National Domestic Violence Hotline is 800-799-SAFE or 800-787-3224 (TDD).

[408] *See, e.g.*, U.S. Department of Justice, Office of Justice Programs, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, Bureau of Justice Statistics Factbook, NCJ-167237, March 1998.

[409] USCCR, *The Health Care Challenge*, p. 91, citing U.S. Department of Health and Human Services, *Healthy People 2010 Objectives*, Injury/Violence Prevention, pp. 7–23.

[410] National Advisory Council on Violence Against Women, "About the Council," accessed at <http://www.ojp.usdoj.gov/vawo/advisorymain.htm>.

[411] National Advisory Council on Violence Against Women, *Ending Violence Against Women: An Agenda for the Nation*, Oct. 11, 2000, accessed at <http://www.4woman.gov/violence/nations.htm>.

[412] National Advisory Council on Violence Against Women, "Nation's Agenda to End Violence Against Women," accessed at <http://www.4woman.gov/violence/nations.htm>

[413] William J. Clinton, Memorandum for the Secretary of State, the Attorney General, the Administrator of the Agency for International Development, and the Director of the U.S. Information Agency, re: Steps to Combat Violence Against Women and Trafficking Girls, Mar. 11, 1998, accessed at <http://www.secretary.state.gov/www/picw/trafficking/steps.htm>.

[414] Ibid.

[415] Ibid.

[416] Juliet Eilperin, "Reauthorization of Domestic Violence Act is at Risk," *The Washington Post*, Sept. 13, 2000, p. A6; "House vote backs programs for victims of domestic violence: Clinton asks Senate to rush renewal bill," *The Washington Times*, Sept. 27, 2000, p. A5.

[417] The White House, Office of the Vice President, "Statement by the Vice President on the Violence Against Women Act (VAWA)," Sept. 26, 2000, accessed at <http://clinton

The President stated, "Unless the Act is reauthorized by September 30, authorization for critical grant programs supporting the victims of domestic violence will be in jeopardy. With over 70 sponsors in the Senate, there is no reason for the delay."[418] Finally, the VAWA reauthorization was signed on October 28, 2000, and became part of the appropriation law for the U.S. Department of Agriculture.[419] The new law includes provisions for combating trafficking in persons, particularly women and children, as well as new provisions addressing battered immigrant women.[420]

Despite these efforts, later developments threatened the implementation of VAWA. In May 2000, the Supreme Court, in *United States v. Morrison*, struck down the portions of the Violence Against Women Act that allowed women to sue assailants in federal court, thus weakening the civil rights provisions of the law.[421] This decision further weakened the legal recognition of the relationship between sexual violence and emotional abuse and sexual harassment.[422] This is particularly devastating given that, although Title VII offers federal legal remedies for sexual harassment in the workplace, emotional abuse and domestic violence may not fall under the protections of Title VII.[423]

In response to the outcome of *Morrison*, President Clinton stated he was "deeply disappointed by the Supreme Court's decision. . . ."[424] The President added that although the decision did not affect provisions of the law concerning grant programs or interstate crimes,

> [t]he Supreme Court did, however invalidate one important provision of the Violence Against Women Act that gave victims of gender-motivated violence the ability to sue their attackers for lost earnings, medical expenses, and other damages. Because I continue to believe that there should be remedies for victims of gender-motivated violence, we plan to study the Supreme Court's decision in *Morrison* to determine the best means to help these victims.[425]

The Commission commends the Clinton administration for its focus on domestic violence. Although domestic violence remains a serious problem in this country, many programs and policies have been set in place within the last eight years that have the potential to help combat this problem.

Broad-Based Civil Rights Issues and Initiatives

The President's Initiative on Race

On June 13, 1997, the President issued Executive Order 13050, which presented his Initiative on Race.[426] The order established a President's Advisory Board on Race to which the President appointed seven persons from outside the federal government.[427] The purpose of the

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6.nara.gov.html>; The White House, Office of Press Secretary, "Statement by the President [on the Violence Against Women Act]," Sept. 26, 2000, accessed at <http://clinton6.nara.gov.html>.

[418] The White House, "Statement by the President [on the Violence Against Women Act]."

[419] Ellen Nakashima and Michael Fletcher, "Clinton Signs $80 Billion Agriculture Bill," *The Washington Post*, Oct. 29, 2000, p. A1.

[420] The White House, Office of the Press Secretary, "Statement by the President [on the reauthorization of the VAWA]," Oct. 11, 2000, accessed at <http://clinton6.nara.gov>; The White House, Office of the Press Secretary, "Statement by the President [upon signing the Victims of Trafficking and Violence Prevention Act of 2000]," Oct. 28, 2000, accessed at <http://clinton6.nara.gov>.

[421] United States v. Morrison, 120 S. Ct. 1740 (2000) (holding that neither the commerce clause nor Section 5 of the 14th Amendment gave Congress the authority to enact the Violence Against Women Act). *See also* Joan Biskupic, "Justices Reject Lawsuits for Rape," *The Washington Post*, May 16, 2000, p. A1; U.S. Department of Justice, Office of Justice Programs, Violence Against Women Office, "About Untied States v. Morrison," accessed at <http://www.ojp.usdoj.gov/vawo/collected.htm>.

[422] USCCR, *Overcoming the Past, Focusing on the Future*, pp. 52–54.

[423] Ibid. *See* Wells v. Lobb and Co., Inc., No. 97-WM-1011, 1999 U.S. Dist. LEXIS 20058 (D. Co. 1999) (finding for plaintiffs on their claims under Title VII and the Violence Against Women Act). *See also* "Conduct by Hooters' Managers Creates Liability Under Violence Against Women Act," *Daily Labor Report*, no. 248 (Dec. 29, 1999), pp. A2–A3; " 'Outrageous Conduct' Violates Violence Against Women Act," *Fair Employment Practices*, no. 889 (Jan. 20, 2000), p. 10.

[424] The White House, Office of Press Secretary, "Statement by the President [on *U.S. v. Morrison*]," May 15, 2000, accessed at <http://clinton6.nara.gov>.

[425] Ibid. Vice President Gore released a similar statement. The White House, Office of the Vice President, "Statement by the Vice President on the Supreme Court Decision to Overturn a Key Provision of the Violence Against Women Act," May 15, 2000, accessed at <http://http://clinton6.nara.gov>.

[426] Exec. Order No. 13,050, 3 C.F.R. 207 (1998).

[427] President Clinton was criticized for his failure to appoint a Native American member to his Race Advisory Board. The

board was to promote a constructive national dialogue on challenging racial issues; to increase the nation's understanding of its race relations and racial diversity; to bridge racial divides by encouraging community leaders to develop and implement approaches that calm racial tensions; and to identify, develop, and implement solutions to racial problems in areas such as education, economic opportunity, housing, health care, and the administration of justice.[428] The board held a series of events to spur the dialogue on racial issues[429] and in September 1998 issued a report.[430]

Emerging from this yearlong dialogue on race, the board's recommendations articulated a specific agenda for achieving its goals. First, the report stressed the importance of recognizing the common values of all people rather than racial differences and discrimination, which tend to divide them.[431] Second, the report found that the absence of knowledge and understanding about the role race has played in our nation's collective history makes it difficult to find solutions that improve race relations, eliminate disparities, and create equal opportunities in all areas of life.[432] Third, the report noted that the nation's minority population is growing and changing, which, among other things, will require improved data collection to reflect the diversity of the United States.[433]

Fourth, the report of the Advisory Board on Race included a list of recommendations to overcome racial discrimination. The report recommended strengthening civil rights enforcement through additional funding and partnerships with states and localities; improving data collection on discrimination against racial and ethnic groups other than African Americans and Hispanics; and strengthening laws and enforcement against hate crimes.[434] In regard to education, the board supported strengthening partnerships among state, local, and tribal governments; encouraging collaboration with private businesses; and recognizing a role for community-based organizations. The report encouraged educating children in high-quality integrated schools and classrooms.[435]

In addition, the report addressed other issues, such as stereotyping. To address stereotyping, which influences how people of different races and ethnicities view and treat each other, the board identified ways of using both public and private institutions and individuals to challenge policymakers and institutional leaders to examine the role of stereotypes in policy development, institutional practices, and in forming one's own racial identity. It recommended holding a presidential event to discuss stereotypes, institutionalizing the promotion of a racial dialogue, and convening a high-level meeting with

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Native American community attested that there cannot be a national dialogue on race without one Native American on the board. Although the board later appointed a Native American and an Alaskan Native to serve as advisors on American Indian issues, the President himself never appointed a Native American to the board. *See* John Hope Franklin, chairman, Advisory Board on Race, letter to Matthew Richter, Teachings of the Children, Nov. 21, 1997, accessed at <http://www.iwchildren.org/prescon.htm>.

[428] Exec. Order No. 13,050.

[429] Forums and roundtables were held in Phoenix, AZ, San Jose, CA, Denver, CO, New Orleans, LA, Louisville, KY, and St. Louis, MO. These included community, corporate, labor, religious, and American Indian tribal leaders as well as representatives of the U.S. Department of Health and Human Services. In addition, a "Campus Week of Dialogue," involved students, faculty, and administrators on nearly 600 campuses; "Statewide Days of Dialogue" involved many communities, governors, and mayors; a variety of youth activities, including a "Call to Action" letter and a presidential briefing, involved youth; and various forms of publicity such as public service announcements, news and magazine articles, a guide for discussions about race, and a Web site with an e-mail address involved the public. *See* the White House, "One America: Board Materials," accessed at <http://clinton4.nara.gov/Initatives/OneAmerica/events/boardmeet.vtb>, the President's Advisory Board on Race, "One America in the 21st Century: Forging a New Future," the Advisory Board's Report to the President, September 1998, accessed at <http://clinton3.nara.gov/Initiatives/OneAmerica/advisory.html>.

[430] The President's Advisory Board on Race, "One America in the 21st Century."

[431] Ibid., pp. 2, 15–16.

[432] According to the report, this ignorance appears in different perceptions about racism. While minority people experience blatant or subtle racism all the time, whites see few race problems, little discrimination, an abundance of opportunity for blacks, and minimal personal prejudice. Whites fail to perceive the systemic white privileges built into our society. In turn, these differences in perceptions make discussions about race-conscious affirmative action difficult and rarely productive. The report, thus, recommended educating the nation about its past and the role race has played in it as a means to help shape solutions and policies that overcome disparate treatment and limited opportunities, and celebrate racial differences. Ibid., pp. 2–3, 34, 45–46.

[433] Ibid., pp. 3, 50–56.

[434] Ibid., pp. 4, 57–59.

[435] Ibid., pp. 4, 59–64.

media leaders on the problem of racial stereotypes.[436]

In looking toward the future of race relations, the President's advisory board identified a number of controversial issues that it could not address. These included affirmative action in either higher education or the workplace; police misconduct toward minorities; negative racial stereotyping in the media; the lack of environmental justice that subjects minority communities to increased health risks associated with toxic pollution; bilingual education; public schools' disproportionate tracking of minority children into less demanding classes; gaps in the access of people of color to new technologies; and negative attitudes among members of different minority groups. These are critical issues that the report identifies as also needing attention.[437]

To carry on the work of the advisory board, in February 1999 the President established the White House Office for the President's Initiative for One America.[438] The mission of this office is to ensure "a coordinated and focused strategy to advance the policies that will close the opportunity gaps that exist for minorities and the underserved in this country, and build the One America we want for all of our nation's children."[439] The mission of the office also is to "promote the goals of educating the American public about race, encourage racial reconciliation through national dialogue on race, identify policies that can expand opportunities for racial and ethnic minorities, and coordinate the work of the White House and federal agencies to carry out the President's vision of One America."[440]

Overall, the goal initiated by President Clinton of promoting racial reconciliation so the nation can become "One America" was unprecedented. Unfortunately, the Initiative on Race appears to have had mixed results.[441] Further, the Office of the President's Initiative for One America has not been in place long enough to have made any significant accomplishments, and the extent of its coordination with the federal civil rights agencies is unclear. However, for his attempts to address the controversial issues related to race, President Clinton should be praised.

Census 2000

The Clinton administration noted that it was "determined to have a fair and full [census] count in 2000" and it initiated several steps to encourage full participation in census 2000, including a nationwide educational campaign about the census.[442] The administration noted that "[a] fair and accurate Census is a fundamental part of a representative democracy and is the basis for providing equality under the law."[443] However, two controversial issues surrounded the 2000 census—the need for increasing accuracy and reducing costs through the use of sampling and the multi-racial classification scheme.

The Use of Sampling

The controversy about the accuracy of the census was brewing even before President Clinton took office. The 1990 census was the first in modern history to be less accurate than the one before it. A post-enumeration survey showed that minorities were more likely to be undercounted than whites. Furthermore, the census was costly, and concerns were raised that even with greater expense, traditional counting methods would not make the census more accurate.[444]

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[436] Ibid., pp. 5–6, 73–74.

[437] Ibid., pp. 93–100.

[438] The White House, Office of the Press Secretary, "President Clinton Names Mary Beth Cahill and Robert B. Johnson as Assistants to the President, Creates the White House Office on the President's Initiative for One America," Feb. 5, 1999, accessed at <http://clinton6.nara.gov/1999/02/05-white-house-office-on-the-initiative-for-one-america.html>.

[439] The White House, "About the Office: Mission Statement," accessed at <http://clinton3.nara.gov/Initiatives/OneAmerica/mission.html>.

[440] Ibid.

[441] The board's report met with some public criticism. *See, e.g.*, Clarence Page, "Initiative of Race Report, Like President Clinton, Is Too Timid," *The Chicago Tribune*, Sept. 20, 1998, Commentary section, p. 21; Jonathan Tilove, "Race Initiative Overshadowed by Lewinsky Affair," *The Plain Deale*, Sept. 19, 1998, p. 2A; Cynthia Tucker, "Initiative on Race a Failure," *The Times-Picayune* (New Orleans, LA), Sept. 28, 1998, p. B5.

[442] The White House, "President Clinton and Vice President Gore: Building One America," Sept. 16, 2000, accessed at <http://clinton4.nara.gov/textonly/WH/new/html/Tue_Oct_3_161926_2000.html>.

[443] Ibid.

[444] Terri Ann Lowenthal, "A Civil Rights Struggle for the Ages: Why the Administration Must Fight to Save Its Census 2000 Plan," chap. VIII in CCCR, *The Test of Our Progress*.

Efforts were then mounted to study and redesign the decennial census.[445]

The Census Bureau unveiled its plan for the 2000 census in February 1996.[446] One strategy of the plan was to make greater use of sampling to improve accuracy and contain costs. The sampling plan, which involved estimating information about undercounted groups rather than direct counting, was not favorably greeted by African American legislators and advocacy groups despite its intended purpose of aiding minority groups.[447] Furthermore, Republicans opposed sampling because of its effect on redistricting, saying "it would add made-up people to benefit Democrats."[448]

President Clinton tried to preserve the use of sampling,[449] and, in order to pass funding for census 2000 preparations, negotiated a legislative compromise with Republican leaders. The compromise authorized any party to file a lawsuit challenging the constitutionality or legality of sampling methods and provided that a special three-judge district court panel would hear such cases, with appeals going to the Supreme Court. In addition, an eight-member Census Monitoring Board was established to carry out a broad-based review of census preparations and operations. Finally, the Census Bureau was required to release census figures both with and without the use of sampling or statistical estimation.[450]

In the aftermath of this compromise, many courts have ruled that sampling could not be used for congressional reapportionment.[451] Furthermore, five states, including Virginia, have passed bills barring the use of data generated by statistical sampling in redrawing congressional districts.[452] Virginia will be one of the first states to redistrict and will serve as an example for other states. Census breakdowns by race and ethnicity, including those with and without sampling, will be released in spring 2001; the state of Virginia plans to have its redistricting completed before its November 2001 election.[453]

Racial Categories

A second controversial issue surrounding the census involves the categories that are used to classify individuals according to race and ethnicity. The racial and ethnic categories used by the Census Bureau and all other agencies receiving federal funds are mandated by the Office of Management and Budget (OMB). Prior to the 2000 census, the five standard race categories for federal data collection efforts were American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; White, not of Hispanic origin; and Hispanic.[454] This categorization was frequently challenged because it did not accommodate people of more than one race; because of preferences concerning specific terms (such as African American instead of black, and Latino instead of Hispanic); and because a Hispanic category was not in the list of races. In 1994, OMB began coordinating a review of the racial and ethnic classification scheme with

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[445] Some of these efforts were supported by the Decennial Census Improvement Act of 1991, Pub. Law No. 102-135 (codified at 13 U.S.C. § 141 (1994)). *See* Lowenthal, "A Civil Rights Struggle for the Ages," pp. 98–99.

[446] Ibid., p. 100.

[447] Ibid.

[448] D'Vera Cohn, "Census Sampling Plan Under Fire: Opponents Question Proposal to Let Bureau Decide Its Use," *The Washington Post*, Aug. 11, 2000, p. A23.

[449] In May 1997, the President vetoed a bill to provide emergency funds for victims of floods in the Northwest and Midwest when Republicans tried to attach a legislative ban on sampling in the census to the measure. He also vetoed the 1998 appropriations bill that included a prohibition against the Census Bureau spending funds to prepare for a census with sampling until the Supreme Court ruled on the constitutionality of the method. Lowenthal, "A Civil Rights Struggle for the Ages," pp. 102–03.

[450] Ibid., p. 103 (citing the Department of Commerce and Related Agencies Appropriations Act of 1998, Pub. Law No. 105-119 §§ 209–210, 111 Stat. 2480–2487 (codified at 13 U.S.C. § 141 note)).

[451] Ibid., p. 104 (citing Glavin v. Clinton, 19 F. Supp. 2d 543 (1998 U.S. Dist.); and U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76 (1998 U.S. Dist)).

[452] D'Vera Cohn, "Census Sampling Plan Under Fire"; D'Vera Cohn, "Virginia Argues for Use of Raw Census Numbers in Redistricting," *The Washington Post*, Sept. 22, 2000, p. A15.

[453] D'Vera Cohn, "Virginia Argues for Use of Raw Census Numbers in Redistricting."

[454] U.S. Department of Commerce, Office of Federal Statistical Policy and Standards, "Directive No. 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting," pp. 37–38 in *Statistical Policy Handbook*, May 1978. The directive also provided for collecting information on ethnicity ("Hispanic Origin" vs. "Not of Hispanic Origin") separately from that on race ("American Indian or Alaskan Native," "Asian or Pacific Islander," "Black" or "White"). Ibid.

changes to be established in time for the 2000 census.[455]

Changes to the racial and ethnic classification scheme were published in October 1997.[456] The following modifications were made: (1) the Asian or Pacific Islander category was separated into two categories—"Asian" and "Native Hawaiian or Other Pacific Islander"; (2) the term "Black" is now designated as "Black or African American," and the term "Hispanic" was changed to "Hispanic or Latino"; and (3) respondents were to be offered the option of selecting one or more racial designations. The new classification scheme was used in the 2000 census and is to implemented in all other federal programs before January 1, 2003.[457]

Although the changes in racial and ethnic categories also permit respondents to identify mixed racial heritage, advocacy groups expressed concerns about whether the results will be tabulated in a useful fashion.[458] These concerns are mounting as the date approaches when the data will be released. However, preliminary reports show that only limited use was made of the opportunity to designate multiple races. Only about 2 or 3 percent of respondents reported mixed heritage.[459]

It is important that the United States has taken efforts to count the number of minority individuals in the country appropriately and to collect data that accurately reflect the many racial and ethnic groups. However, although President Clinton's compromise on the use of sampling allowed the Census Bureau to receive necessary funding and meet statutory requirements for completing the census, at the same time it set in place a legal structure that has limited the use of sampling, which may lead to continued undercounting of minorities. However, it is too soon to tell how minorities will fare as a result of census 2000, or if the expanded racial categories will be appropriately used to more accurately reflect the diversity of the nation.

Affirmative Action

"I believe that we should mend, not end affirmative action, because even with all our progress, the overwhelming evidence is that it is necessary to combat lingering discrimination. At the same time, I want affirmative action to remain consistent with our ideals of personal responsibility and merit. That means no quotas, no discrimination of any kind and no preferences for unqualified individuals.

All this is consistent with the fairness that I have always tried to live by and with my deep belief in the overriding principle of affirmative action—equal opportunity for all our people.

At the bottom of it all, it's the dream of the possibilities that come with opportunity that has built up America. As a people, we must always uphold our American dream, and as your president, I will always defend it."[460]

—President Clinton, November 1995

The 1990s saw significant changes in the law's direction on affirmative action. The courts set the stage for a narrowing of affirmative action's ambit through several key decisions in such areas as federal contracting and higher education, thus placing new restrictions on the administration and state entities that sought to pursue affirmative action policies. In some respects, the Clinton administration attempted to respond to these challenges.

In addition, there are several programs in place within the federal government that call for affirmative action. For example, the executive order on the employment of persons with disabilities pledges that the government will employ 100,000 individuals with disabilities by 2005.[461] Further, the Office of Federal Contract Compliance Programs continues to enforce the requirements of President Lyndon B. Johnson's Executive Order 11246, which requires contractors and subcontractors with a federal contract of $50,000 or more and 50 or more employees to develop written affirmative action programs.[462]

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[455] Pam Ginsbach, "Race, Ethnic Category Review Ready for First Major Field Test," *Daily Labor Report*, May 16, 1995, p. C1.

[456] 62 Fed. Reg. 58781–58791.

[457] *Id.* at 58782, 58789.

[458] *Id.* at 58784–58785.

[459] D'Vera Cohn, "Census Race Question Has Limited Impact: Survey Finds That About 2% of Respondents Report Having Mixed Heritage," *The Washington Post*, July 30, 2000, p. C8.

[460] Bill Clinton, "From Hope, Ark., with new hope for a new America," *Ebony*, vol. 51, no. 1 (November 1995), p. 38.

[461] Exec. Order No. 13,163. *See* p. 45 above.

[462] Exec. Order No. 11,246, 3 C.F.R. 339 (1965).

In November 2000 the office issued its revised regulations on implementing that order.[463]

Nonetheless, the issue of affirmative programs in employment, education, and other arenas remains unresolved. The Commission acknowledges the Clinton administration's efforts on affirmative action through federal programs, guidance, and regulations. However, affirmative action policies remain in transition across the country. Several recent legal challenges to affirmative action policies illustrate the challenges inherent in this transition.[464] Overall, the Clinton administration did not aggressively respond to these challenges. The administration addressed affirmative action through symbolic words and internal agency policy, yet took no proactive steps in the form of proposed legislation or strong enforcement of Title VI.

In particular, the administration and the Office for Civil Rights at the Department of Education failed to enforce Title VI in the higher education context effectively.[465] Admissions policies at universities and colleges across the country continue to create an overwhelmingly adverse impact for African Americans, Latinos, and other people of color, in potential violation of the explicit provisions of the Title VI regulations.[466] The pervasive and heavy reliance on the SAT[467] has long been viewed as a principal source of this adverse impact.[468] Yet, the Department of Education has failed to address the issue in any practical or systemic way in its Title VI enforcement efforts.[469] In particular, the Office for Civil Rights under the Clinton administration failed to take the elementary step of requiring schools to find less discriminatory alternatives to reduce the adverse impact in admissions policies created by the use of the SAT.

Moreover, the problem has worsened with the passage of policy and voter-initiated laws in several states designed to end or significantly curtail affirmative action policies.[470] For example, with the passage of Proposition 209, which effectively ended affirmative action in California, the adverse impact for black and Latinos students seeking college admission in that state has grown exponentially. Shortly after the passage of Proposition 209, the Secretary of Education issued a letter to California colleges and universities stating that the department would assess Proposition 209's implementation in light of federal statutory requirements.[471]

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[463] 65 Fed. Reg. 68021-68046 (Nov. 13, 2000).

[464] *See* Gratz v. Bollinger, 122 F. Supp. 2d 811 (2000); Hopwood v. Texas, 2000 U.S. App. LEXIS 33523 (2000).

[465] *See* Deborah J. Wilds and Diane C. Hampton, "Minority Access to Higher Education," chap. XVII in CCCR, *The Test of Our Progress*.

[466] These regulations state, in pertinent part, that a recipient of federal assistance "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. 100.3(b)(2) (2000).

[467] Formerly the acronym stood for "Scholastic Aptitude Test" and later "Scholastic Assessment Test." In 1996, the Educational Testing Service, the organization that produces the SAT, announced that the acronym would no longer stand for anything.

[468] In a speech delivered to the American Council on Education in Washington, Richard Atkinson, president of the University of California, took the unprecedented step of proposing to drop the SAT "aptitude" test as a requirement for U.C. admission. Mr. Atkinson recommended that "all U.C. campuses move away from admissions processes that use narrowly defined formulas and instead adopt procedures that look at applicants in a comprehensive way—using tests chiefly to illuminate a student's total record—and take into account the student's high school environment." *See* Richard Atkinson, "Speech Before the American Council on Education," Feb. 17, 2001, adapted in *The Washington Post*, "SAT Is to Admissions as Inadequate Is to . . . ," Feb. 25, 2001, pp. B1, B4.

[469] The Office for Civil Rights issued a "resource guide" on the use of "high-stakes" testing in 2000. U.S. Department of Education, Office for Civil Rights, *The Use of Tests as part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy-Makers*, December 2000. This document offers guidance to schools and institutions of higher education. The document states that "[t]he legal nondiscrimination standard regarding neutral practices (referred to by the courts as the 'disparate impact' standard) provides that if the education decisions based upon test scores reflect significant disparities based on race, national origin, sex, or disability in the kinds of educational benefits afforded to students, then questions about the education practices at issue (including testing practices) should be thoroughly examined to ensure that they are in fact nondiscriminatory and educationally sound." *Resource Guide*, p. iv. However, the extent to which the Office for Civil Rights translated this guidance into effective civil rights enforcement measures such as targeted compliance reviews remained quite limited during the Clinton administraton.

[470] *See* Wilds and Hampton, "Minority Access to Higher Education."

[471] Richard Riley, Secretary, U.S. Department of Education, "Dear Colleague" letter, Mar. 19, 1997.

However, to date, the Department of Education has not issued policy on Proposition 209's effect on federal civil rights enforcement. In particular, the department has failed to clarify the effect of Proposition 209 in light of a Title VI regulatory provision requiring affirmative action in overcoming the effects of past discrimination.[472]

Adarand Constructors, Inc. v. Peña

In 1995, the U.S. Supreme Court issued a seminal decision in the case of *Adarand Constructors, Inc. v. Peña*.[473] In *Adarand*, the Court tested the constitutionality of a Department of Transportation contracting program requiring that "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year" would go to businesses operated by members of "socially and economically disadvantaged" groups, where the term "socially and economically" required a *presumption* of including blacks, Hispanics, Native Americans, Asian Americans, Pacific Islanders, and "other minorities or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act."[474]

The signal importance of *Adarand* was the Supreme Court's holding that all racial classifications, whether part of a federal, state, or local government plan, must be subject to a "strict scrutiny" standard.[475] The Court held that the Constitution requires strict scrutiny analysis, referring to a standard under which the challenged government action must be justified as *narrowly tailored* to further *a compelling state interest*.[476] Applying this standard, government action of any kind is only constitutionally permissible if the government can show that it had a "compelling" reason for the plan and that the plan was "narrowly tailored" to meet that objective.[477] This is the Court's most searching form of scrutiny, and government action subjected to it will have great difficulty surviving a constitutional challenge. Moreover, the Court has indicated that the goal of redressing societal discrimination is not a sufficiently "compelling" interest to undertake a race-conscious remedial plan.[478]

Nonetheless, even in *Adarand*, a case whose name has become synonymous with anti-affirmative action sentiment, the Court left the door open for some kinds of affirmative action plans. The Court acknowledged:

> [W]e wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." . . . The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.[479]

The narrow ambit carved out by the Court in *Adarand* for conducting affirmative action programs has not prevented the Clinton administration from pursuing affirmative action poli-

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[472] The regulations state, in pertinent part, "In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination." 34 § C.F.R. 100.3(b)(6)(i) (2000).

[473] 515 U.S. 200 (1995).

[474] 515 U.S. at 205 (citing the Small Business Act, 15 U.S.C. § 637(d)(3)(C) (1994)). This provision of the Small Business Act states that "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." *Id.*

[475] 515 U.S. at 227 (stating, "[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests"). The Court vacated the 10th Circuit's decision and remanded the case for review of the Department of Transportation program under the "strict scrutiny" standard. 515 U.S. at 239. *See* Adarand v. Peña, 16 F.3d 1537, 1547 (10th Cir. 1994) for the 10th Circuit's decision upholding the constitutionality of the DOT program's use of subcontractor compensation clauses.

[476] 515 U.S. at 235 (citing Fullilove v. Klutznick, 448 U.S. 448, 496 (1980)).

[477] 515 U.S. 200, 235–37. *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (applying the strict scrutiny standard to minority set-aside plans); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277–78 (1986) (plurality opinion) (applying the strict scrutiny standard in the education context).

[478] 488 U.S. 469, 498–501 (stating that "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota"). *Id.* at 499.

[479] 515 U.S. at 237 (citations omitted).

cies in the context of federal employment and contracting. However, the *Adarand* court's proscriptions for conducting affirmative action programs required the administration to take steps to address the Court's decision. For example, in a particularly impassioned speech, President Clinton recommended that the nation should "reaffirm the principle of affirmative action and fix the practices. We should have a simple slogan: Mend it, but don't end it."[480] The President stated:

> We've got to find the wisdom and the will to create family-wage jobs for all the people who want to work; to open the door of college to all Americans; to strengthen families and reduce the awful problems to which our children are exposed; to move poor Americans from welfare to work.
>
> This is the work of our administration—to give the people the tools they need to make the most of their own lives, to give families and communities the tools they need to solve their own problems. But let us not forget affirmative action didn't cause these problems. It won't solve them. And getting rid of affirmative action certainly won't solve them.
>
> If properly done, affirmative action can help us come together, go forward and grow together. It is our moral, legal and practical interest to see that every person can make the most of his life. In the fight for the future, we need all hands on deck and some of those hands still need a helping hand.
>
> In our national community we're all different, we're all the same. We want liberty and freedom. We want the embrace of family and community. We want to make the most of our lives and we're determined to give our children a better one. Today there are voices of division who would say forget all that. Don't you dare. Remember we're still closing the gap between our founders' ideals and our reality. But every step along the way has made us richer, stronger and better. And the best is yet to come.[481]

In the wake of the *Adarand* decision, the Department of Justice developed "Post-*Adarand* Guidance on Affirmative Action in Federal Employment."[482] It also issued regulations concerning affirmative action in federal contracting.[483] Despite such attention, however, overall, the Clinton administration made insufficient effort to "mend" affirmative action policies.

Additional Challenges to Affirmative Action

In 1996, a three-judge panel of the Fifth Circuit found a professional school's admissions policies impermissible under the equal protection clause.[484] This case, *Texas v. Hopwood*, illustrates the current hostility of the federal judiciary toward affirmative action policies in the professional school context. In *Hopwood*, a case brought by individuals claiming race discrimination resulting from an affirmative action policy that allegedly imposed racial preferences in law school admissions, the Fifth Circuit held that the policy was unconstitutional.[485] The *Hopwood* court dismissed entirely the plurality opinion in *Regents of the University of California v. Bakke*,[486] a major Supreme Court precedent in the affirmative action context. In *Bakke*, five justices found that although a quota system violated the equal protection clause by discriminating on the basis of race, the University of California at Davis medical school could not be enjoined from pursuing future admissions policies based on affirmative action principles.[487] Also in 1996, California voters approved Proposition 209, restricting affirmative action by state and other public entities.[488] Regrettably, the Clinton administration largely ignored such challenges to affirmative action and did not attempt to question the legality of state laws prohibiting affirmative action.

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[480] The White House, Office of the Press Secretary, "Remarks by the President on Affirmative Action," July 19, 1995, accessed at <http://www.usdoj.gov/crt/affirm.txt>. *See* John F. Harris, "Clinton Avows Support For Affirmative Action; 'Mend It, but Don't End It,' President Says in Speech," *The Washington Post*, July 20, 1995, p. A1.

[481] The White House, "Remarks by the President on Affirmative Action."

[482] John R. Schmidt, Associate Attorney General, U.S. Department of Justice, Memorandum to General Counsels, re: Post-*Adarand* Guidance on Affirmative Action in Federal Employment, Feb. 29, 1996.

[483] *See* U.S. Department of Justice, "Administration Issues Proposed Regulations Reforming the Use of Affirmative Action in Federal Contracts," May 6, 1997, accessed at <http://www.usdoj.gov/opr/pr/1997/May97/190cr.htm>.

[484] 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

[485] 78 F.3d at 940.

[486] 438 U.S. 265 (1978).

[487] 438 U.S. at 307, 320.

[488] *See* California Secretary of State, "Analysis of Proposition 209," accessed at <http://Vote96.ss.ca.gov/Vote96/html/BP/209analysis.htm>.

Disparate Impact Discrimination

Facially neutral policies and practices that act as arbitrary and unnecessary barriers to equal opportunity are outlawed under the Title VI/Title IX regulations.[489] Under Executive Order 12250, the Department of Justice is responsible for ensuring that funding agencies meet their responsibilities under Title VI. The Clinton administration's Justice Department showed that it was committed to proactive and effective enforcement of Title VI/Title IX regulations by each agency that extends federal financial assistance.

During the Clinton administration, there was a renewed commitment to enforcing agency regulatory provisions prohibiting disparate impact discrimination. In July 1994, Attorney General Janet Reno issued a memorandum to the heads of departments and agencies providing federal financial assistance on the use of the disparate impact standard in administrative regulations promulgated under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972.[490] In this memorandum, the Attorney General reminded agency heads that "agencies may validly adopt regulations implementing Title VI that also prohibit discriminatory effects" and that "administrative regulations implementing Title VI apply not only to intentional discrimination but also to policies and practices that have a discriminatory effect."[491]

In addition, the Attorney General informed heads of agencies that "[t]his Administration will vigorously enforce Title VI. As part of this effort, and to make certain that Title VI is not violated, each of you should ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of federally financed programs."[492] In a strong statement of commitment to this effort, the Attorney General stated:

> Enforcement of the disparate impact provisions is an essential component of an effective civil rights compliance program. Individuals continue to be denied, on the basis of their race, color, or national origin, the full and equal opportunity to participate in or receive the benefits of programs assisted by federal funds. Frequently discrimination results from policies and practices that are neutral on their face but have the effect of discriminating. Those policies and practices must be eliminated unless they are shown to be necessary to the program's operation and there is no less discriminatory alternative.[493]

In keeping with the Attorney General's directive in this memorandum, during the 1990s, the U.S. Commission on Civil Rights issued numerous reports detailing the continued need for vigorous enforcement of disparate impact regulatory provisions in a variety of important contexts, most notably education and access to health care.[494] In these reports, the Commission noted that disparate impact on the bases of such classifications as race, color, national origin, sex, and disability, is an ever-present form of discrimination occurring each day across the nation in school districts, the health care system, and workplaces.

The Commission recognizes the Clinton administration for acknowledging the importance of vigorously enforcing prohibitions of disparate impact discrimination and taking steps to ensure that federal agencies develop regulations that incorporate the use of the disparate impact standard. However, the Clinton administration's record of actually using disparate impact theory in bringing Title VI cases was poor. For instance, the Clinton administration made no effort to enforce Title VI in the education context in the wake of Proposition 209.

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[489] A policy may appear neutral "on its face" and be applied evenhandedly to all employees and applicants but nonetheless have an adverse impact on minorities resulting in discrimination. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); U.S. Equal Employment Opportunity Commission, *Compliance Manual*, "Theories of Discrimination," § 604.1(b).

[490] Janet Reno, Attorney General, Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance, re: Use of the Disparate Impact Standards in Administrative Regulations Under Title VI of the Civil Rights Act of 1964, July 14, 1994.

[491] Ibid.

[492] Ibid.

[493] Ibid.

[494] *See, e.g.*, USCCR, *Equal Educational Opportunity Series*; USCCR, *The Health Care Challenge*.

CHAPTER 4

Lessons Learned

"Despite the persistence of racial and ethnic tensions, today in the nation there are an increasing number of communities, workplaces, and college campuses where people live, work, and study together productively and in harmony. Despite the tensions spurred by the increased immigration of people of color from around the world, the new diversity is enriching our society and increasing our economic strength. So it is possible to envision a day when the 'problem of the color line' will no longer be the problem of American society and when we can celebrate the befits of diversity in the knowledge that everyone's talents and potential can be developed to the fullest."[1]

—Citizens' Commission on Civil Rights, 1997

As we enter the 21st century, the United States continues to undergo rapid demographic and technological change. Race, ethnicity, gender, age, and many other aspects of our diversity are immense in scope and greater than at any time in the past. Our schools, workplaces, and communities are filled with people whose cultural and religious heritages, racial and ethnic backgrounds, family structures, and daily lives are far more heterogeneous than ever before. Diversity has been accompanied by a twin phenomenon shaping our future: the unprecedented technological change of the past two decades. Amazing new technologies are creating seemingly infinite possibilities for mass communication, commerce, health care, and education, to name a few areas.

Our nation's leaders must display initiative, creativity, and unusual astuteness in responding to the challenges of this ever-quickening pace of change. This is particularly true in the context of growing global economic competitiveness. In finding effective responses to these challenges, our leaders must work to maximize the economic, social, and cultural benefits that our diversity undoubtedly provides. They also must recognize and act on the need to ensure that the nation's high level of diversity is reflected in civil rights policy and enforcement. In today's world, efforts to maintain and build on our economic prosperity will have little success, and notions of equal opportunity and social justice will have little meaning, without a genuine respect for and a deep understanding of what diversity means, how it can benefit our lives, and how it affects the nature and direction of civil rights enforcement efforts.

A fundamental aspect of understanding the importance of diversity is recognizing that it provides us with enormous opportunities, as well as challenges. President Clinton, perhaps more than any other political leader in recent years, has shown that he possesses a strong commitment to maximizing our nation's potential by relying in large part on our diversity. He has stated that "[q]uality and diversity can go hand in hand, and they must."[2] Clinton's belief in valuing our diversity manifested itself in important ways, not least of which was his dedication to civil rights policy development and law enforcement.

The new and unprecedented civil rights policies of the Clinton administration have helped to end the long period of stagnation, indifference, and dogged maintenance of the status quo that have characterized previous administrations' civil rights records. Overall, the Clinton administration made civil rights law enforcement and policy development a priority. President Clinton

[1] Citizens' Commission on Civil Rights, *The Continuing Struggle: Civil Rights and the Clinton Administration*, 1997.

[2] Quoted in U.S. Office of Personnel Management, Employment Service Diversity Office, *Building and Maintaining a Diverse High Quality Work Force: A Guide for Federal Agencies*, June 2000, p. 1, accessed at <http://www.opm.gov>.

embraced efforts to promote equal opportunity and diversity within the federal government, in federally assisted programs and activities, and in a number of other key areas. While some policies and initiatives were ill-timed or poorly executed, the overall spirit of innovation and a willingness to address difficult issues, such as race relations and discrimination on the basis of sexual orientation, demonstrated the Clinton administration's commitment to the goal of equal opportunity and the benefits of diversity.

President Clinton promised to achieve several ambitious civil rights goals, and to his credit, sought practical means to keep these promises. His most effective means for achieving these goals were public statements, executive orders, executive memoranda, and his attempts to diversify the cabinet, the federal judiciary, and the White House staff.

Viewed as a whole, the themes highlighted in the Clinton civil rights record teach several useful lessons. First, policy innovation must be embraced. Some Clinton policies, such as "Don't Ask, Don't Tell," were extremely controversial. Nonetheless, the controversies themselves indicate that the national dialogue on the matter of extending civil rights protections has been reinvigorated. This, surely, is a step in the right direction and, for this, the Clinton administration must be applauded.

Second, the challenges of external political circumstances provide yet another lesson. Although the President often faced opposition from Congress and other bodies, he continued to vocally support civil rights measures, such as the Employment Nondiscrimination Act. In so doing, President Clinton sent a clear message that civil rights remain an important part of any political agenda for the 21st century. Moreover, in many instances, the President was able to gather consensus across a broad spectrum by remaining open to compromise and displaying a willingness to recognize the opposition's concerns.

The lessons for, and our advice to, the next administration are as follows. First, it needs to start with a clear commitment to civil rights. There must be an uncompromising focus on ensuring equal opportunity for everyone and the elimination of all barriers that stand in the way of a truly level playing field. This commitment must be articulated clearly and frequently, first and foremost by the President. He must prioritize civil rights issues and fully utilize the bully pulpit available only to him.

Second, he must aggressively secure resources for the promotion and enforcement of civil rights. There is a direct correlation between the effectiveness of enforcement and the money spent for those purposes. Better and more creative management can only go so far. Third, the next President must be persistent. It must be a continuing theme of the administration, and a priority within the highest levels of the White House, not something that is forgotten for long stretches of time.

Fourth, smart management and leveraging existing resources are essential. While strong leadership must come from the West Wing, the White House must coordinate carefully with its executive branch civil rights agencies, departments, divisions, and offices to develop a strong strategy and implementation plan. Nongovernment civil rights groups must be tapped for their expertise. Fifth, the administration needs to develop a means of measuring success and a mechanism to evaluate periodically whether civil rights goals are being achieved.

Finally, while certain civil rights issues spark controversy and debate, and probably always will, the next President must remember that common ground can be found on many more issues. The next President must reach out to all Americans, irrespective of their views on any specific issue, as long as they possess a good faith belief in the need to further advance civil rights and a desire to create a country closer to the goal that everyone living in American has an equal opportunity to achieve his or her dreams. By building on the existing foundation that Presidents of both parties have contributed to over the many years, the next President can move the country significantly toward one that actually achieves Dr. Martin Luther King's ideal of a nation where everyone is judged solely on his or her character, and nothing more.

Dissenting Statement by Commissioner Abigail Thernstrom and Commissioner Russell G. Redenbaugh

It is unclear why the Commission has chosen to push this report through on a "poll vote," a procedure that has proved highly controversial in the past since it effectively forecloses a full and open public discussion of the issues before us. The report needs discussion. It is a partisan document issued by a nonpartisan commission.

By and large, Americans want the nation's civil rights laws aggressively enforced. And yet this report implies this consensus is honored only by Democratic administrations, never by Republicans. The charge is false and misleading, and it further politicizes an already too-politicized debate.

Civil rights issues are inevitably intertwined with politics, and Democrats and Republicans do tend to differ on some basic questions. For instance, there are important differences regarding the use of preferences and classifications based on race, ethnicity, and gender; race-based school assignments in an effort to promote integration; and the use of the "disparate impact" standard in judging questions of opportunity or access. But those who disagree cannot be legitimately described as pro- and anti-civil rights; they have differing views on how to reach the common goal of full inclusion.

The present report rightly acknowledges former President Clinton's own commitment to civil rights. And it correctly concludes that the administration's record must be viewed as "a promise only partly fulfilled"—that it did not turn "the rhetoric of strong civil rights enforcement into a practical reality." We would go further: the Clinton administration played a polarizing brand of racial and ethnic politics, and it did little to build its promised "bridge to one America."

There is much civil rights work still to be done, and we hope that President George W. Bush will be tackling old and new problems in fresh and imaginative ways. His commitment to closing the racial gap in academic achievement, his work with black ministers who are serving the urban poor, and his multiracial, multiethnic cabinet are all good signs. We also commend the President's commitment to expanding economic opportunities through tax and social security reform. The Commission, too, has a role to play, but only if it can return to its bipartisan mission.

Editor's Note

The Commissioners originally received draft copies of *A Bridge to One America: The Civil Rights Performance of the Clinton Administration* in January 2001, in advance of the January 12, 2001, Commission meeting. The Commissioners decided at that meeting to postpone a vote on the report until the following meeting to enable the Commissioners to comment and suggest changes. The Commissioners agreed to a further postponement at the February 16 meeting to allow for further comments. At the March 9, 2001, meeting, with all eight Commissioners present, including Commissioners Redenbaugh and Thernstrom, the Commissioners discussed and decided without objection to adopt the voting procedures applied to this report.

APPENDIX A

Civil Rights Timeline, 1990–2000

Key Congressional and Judicial Actions	Year	Key Presidential and Administration Actions
	1990	
• Hate Crime Statistics Act • Americans with Disabilities Act		
	1991	
• Civil Rights Act of 1991		
	1992	
• Rehabilitation Act Amendments • Voting Rights Language Assistance Act		
	1993	
• Family and Medical Leave Act • National Voter Registration Act • *Shaw v. Reno*		• 1993 Apology Resolution (to Native Hawaiians)
	1994	
• Violent Crime Control and Law Enforcement Act • Violence Against Women Act • Hate Crimes Sentencing Enforcement Act • Freedom of Access to Clinic Entrances Act • Native Hawaiian Education Act • Employment Nondiscrimination Act first introduced		• Attorney General memorandum on Title VI and Disparate Impact • Executive Order on Coordination of Fair Housing in Federal Programs • Executive Order on Environmental Justice • Executive Order on Educational Excellence for Hispanic Americans • Executive Order on Procurement with Small Businesses Owned and Controlled by Socially and Economically Disadvantaged Individuals, Historically Black Colleges and Universities, and Minority Institutions • DOD's "Don't Ask, Don't Tell" Policy implemented
	1995	
• *Adarand v. Peña* • *Bush v. Vera*		• Establishment of the National Advisory Council on Violence Against Women
	1996	
• Church Arson Prevention Act • Personal Responsibility and Work Opportunity Reconciliation Act • Health Insurance Portability and Accountability Act • Illegal Immigration Reform and Responsibility Act • Antiterrorism and Effective Death Penalty Act • Hawaiian Home Lands Recovery Act • *Hopwood v. Texas*		• Executive Order on Educational Technology and Ensuring Opportunity for All Children • Executive Order on Tribal Colleges and Universities • Executive Order on Indian Sacred Sites • DOJ's Post-*Adarand* Guidance issued • Civil Rights Action Team established at USDA

Key Congressional and Judicial Actions	Year	Key Presidential and Administration Actions
	1997	
		• Presidential memorandum on law enforcement in Indian country • President's Advisory Board on Race created • "Make 'Em Pay" Initiative implemented to combat housing-related hate crimes • OMB guidance on racial and ethnic classifications • White House guidelines on religious freedom in the federal workplace
	1998	
• *Pigford v. Glickman*		• Executive Order on Increasing Employment of Adults with Disabilities • Executive Order on Consultation and Coordination with Indian Tribal Governments • Executive Order on American Indian and Alaska Native Education • Presidential memorandum on combating violence against women and trafficking in women and girls • EPA interim guidance on investigating Title VI complaints • Advisory Board on Race report issued
	1999	
• Paycheck Fairness Act introduced • Traffic Stops Study Act introduced • Patients' Bill of Rights introduced • *Cureton v. NCAA* • *Keepseagle v. Glickman*		• Executive Order on Discrimination in Federal Employment on the Basis of Sexual Orientation and Parental Status • Executive Order on Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs • Presidential memorandum on Fairness in Law Enforcement • President's "Poverty Tours" • DOJ guidance on enforcement of Title VI and related statutes in block grant programs

Key Congressional and Judicial Actions	Year	Key Presidential and Administration Actions
• *Rice v. Cayetano* • *United States v. Morrison* • American Competitiveness in the Twenty-First Century Act • Violence Against Women Act of 2000 • Hate Crime Statistics Improvement Act introduced • Legal Immigration and Family Equity Act	2000	• Executive Order Prohibiting Discrimination in Federal Employment Based on Genetic Information • Executive Order on Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs • Executive Order on Increasing the opportunity for individuals with disabilities to be employed in the Federal Government • Executive Order on Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation • Executive Order on Improving Access to Services for Persons with Limited English Proficiency • Executive Order on Hispanic Employment in the Federal Government • Census 2000 conducted with new racial and ethnic categories • HHS guidance on limited English proficiency • DOD Inspector General report on "Don't Ask, Don't Tell" policy • EPA issued draft guidance on environmental justice • EEOC revised Federal sector employment regulations • Presidential memorandum on Renewing the Commitment to Ensure that Federal Programs are Free from Disability-Based Discrimination • Title IX regulations revised
	2001	• President's Report to Congress on the Unfinished Work of Building One America • Executive Order establishing the President's Commission on Educational Resource Equity

APPENDIX B

Executive Orders Relating to Civil Rights, 1994–2000

1994

- Executive Order 12892, "Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing," January 17, 1994
- Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," February 11, 1994
- Executive Order 12900, "Educational Excellence for Hispanic Americans," February 22, 1994
- Executive Order 12928, "Promoting Procurement With Small Businesses Owned and Controlled by Socially and Economically Disadvantaged Individuals, Historically Black Colleges and Universities, and Minority Institutions," September 16, 1994

1996

- Executive Order 12999, "Educational Technology: Ensuring Opportunity for All Children in the Next Century," April 17, 1996
- Executive Order 13,007, "Indian Sacred Sites," May 24, 1996
- Executive Order 13021, "Tribal Colleges and Universities," October 19, 1996

1997

- Executive Order 13050, "President's Advisory Board on Race," June 13, 1997
- White House Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, August 14, 1997

1998

- Executive Order 13078, "Increasing Employment of Adults With Disabilities," March 13, 1998
- Executive Order 13084, "Consultation and Coordination With Indian Tribal Governments," May 14, 1998
- Executive Order 13087, "Further Amendment to Executive Order 11478, Equal Employment Opportunity in Federal Government," May 28, 1998
- Executive Order 13090, "President's Commission on the Celebration of Women in American History," June 29, 1998
- Executive Order 13096, "American Indian and Alaska Native Education," August 6, 1998
- Executive Order 13021, "Amendment to Executive Order 13021, Tribal Colleges and Universities," October 19, 1998
- Executive Order 13107, "Implementation of Human Rights Treaties," December 19, 1998

1999

- Executive Order 13125, "Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs," June 7, 1999

2000

- Executive Order 13145, "To Prohibit Discrimination in Federal Employment Based on Genetic Information," February 8, 2000
- Executive Order 13152, "Further Amendment to Executive Order 11478, Equal Employment Opportunity in Federal Government," May 2, 2000
- Executive Order 13160, "Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs," June 23, 2000
- Executive Order 13163, "Increasing the Opportunity for Individuals With Disabilities to be Employed in the Federal Government," July 26, 2000
- Executive Order 13164, "Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation," July 26, 2000
- Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," August 11, 2000
- Executive Order 13171, "Hispanic Employment in the Federal Government," October 12, 2000

2001

- Executive Order 13190, "President's Commission on Educational Resource Equity," January 15, 2001

APPENDIX C

President Clinton's Recommendations for Building One America

Before President Clinton left office in January 2001, he sent a report to Congress detailing the unfinished work of building "One America." In that report, the President offered several recommendations for completing this work. These recommendations are presented below.

I. ECONOMIC AND SOCIAL PROGRESS

New Markets—Ensuring that the Benefits of Our Strong Economy Reach All

Recommendation: Vigorously implement the New Markets legislation and pass more of the Empowerment Agenda; a substantial increase in the minimum wage; more child care; health care for working parents, starting with the parents of children already covered under CHIP; more education, training and mentoring for minority youths; legislation to ensure that women get equal pay for equal work; and expansion of the Family and Medical Leave Act; and passage of APIC.

Responsible Fatherhood

Recommendation: Pass a bipartisan fatherhood bill that provides grants to help low-income and non-custodial parents—mainly fathers—work, pay child support and reconnect with their children.

Native Americans

Recommendation: Make up for lost time by continuing to pass bipartisan increases in our nation's investment in turning around Native American schools, reducing the enormous disparity in Native American health, and attracting new business to Indian Country.

II. EDUCATIONAL EXCELLENCE FOR ALL CHILDREN

Recommendation: Reauthorize the Elementary and Secondary Education Act so that federal education funds promote higher standards and accountability for results, put qualified teachers in all classrooms, and turn around all failing schools. Finish the job of hiring 100,000 teachers to reduce class size. Expand after-school and summer school and help to make sure all students reach high standards. Mentor disadvantaged youth to increase the chance they go to college. Provide tax credits to help build or modernize 5,000 schools. Act on the findings of the newly appointed Presidential Commission on Resource Equity, that is charged with finding ways to close the resource equity gap between schools in poor communities and those in more affluent ones.

III. CIVIL RIGHTS ENFORCEMENT

Recommendation: Redouble our efforts to end all forms of discrimination against any group of Americans by expanding investments in civil rights enforcement and passing the Employment Nondiscrimination Act.

Eliminate Hate Crimes

Recommendation: Recognize that hate crimes do damage not only to the victims, but to the moral fiber of our nation. They are different from other crimes and they deserve to be treated as such. The new Congress and Administration should pass the revised Hate Crimes Prevention Act without further delay.

Immigration

Recommendation: Restore vital benefits to legal immigrants and do not target legal immigrants unfairly; re-institute fairness and due process in our immigration system; restructure the Immigration and Naturalization Service (INS); continue to help immigrants learn English and the duties of citizenship and invest in education and training.

IV. CRIMINAL JUSTICE REFORM

Community Policing and "Hot Spots"

Recommendation: Build on the success of community policing by creating partnerships with local prosecutors. Increase community policing in the disadvantaged areas that need them most, with more resources, including 1,000 community prosecutors and completion of our 50,000 Community Policing Initiative, and police officers targeted to crime "hot spots."

Gun Safety Legislation

Recommendation: Pass common-sense gun safety legislation to close the gun show loophole, require safety locks to prevent child access to guns, and ban the importation of large capacity ammunition clips.

Ex-Offenders

Recommendation: Expand drug testing and treatment to make sure that ex-offenders leave the criminal justice system drug-free. Expand community supervision and job training so they can become productive citizens who never return to a life of crime or prison.

Crime Prevention

Recommendation: Help young people avoid crime by giving them something to say yes to, by dramatically expanding after-school programs and increasing support for mentoring, after-school programs, adult supervision, and role models.

Racial Profiling

Recommendation: End the intolerable practice of racial profiling by continuing efforts to document extent of problem and passing a national law banning the practice of racial profiling.

Mandatory Minimum Sentencing

Recommendation: Re-examine federal sentencing guidelines, particularly mandatory minimums for non-violent offenders. Pass legislation to shrink the disparity between crack and powder cocaine sentencing from the current 100-to-1 to 10-to-1.

The Death Penalty

Recommendation: Pass and sign legislation to provide greater access to post-conviction DNA testing and increased access to competent counsel for defendants in capital cases.

V. ELIMINATING RACIAL AND ETHNIC HEALTH DISPARITIES

Recommendation: Eliminate key racial and ethnic disparities in health by 2010, by expanding investment in research into such disparities, in HIV/AIDS prevention, and in the treatment of diseases that disproportionately harm people of color.

VI. VOTING REFORM

Recommendation: Appoint a non-partisan Presidential Commission on election reform to ensure a fair, inclusive and uniform system of voting standards, prevent voter suppression and intimidation and increase voter participation. Declare election day a national holiday. Give ex-offenders who have repaid their debt to society the chance to earn back the right to vote.

VII. CIVIC RESPONSIBILITY: BUILDING ONE AMERICA IS THE WORK OF EVERY AMERICAN

Recommendation: Maintain the White House Office on One America, and reauthorize the National and Community Service Trust Act. Every American should become engaged in the work of expanding opportunity for all and building One America.